(2) Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

In The
Supreme Court of the United States

October Term, 1994

FEI, LTD., JOHN J. FOGARTY
and JEAN FOGARTY,

Petitioners,

-against-

OLYMPIA & YORK BATTERY PARK COMPANY, also known as WFC TOWER A COMPANY; O&Y (U.S.) DEVELOPMENT CORP., as successor to O&Y TOWER C CORP.; OLYMPIA & YORK TOWEP. B COMPANY; OLYMPIA & YORK TOWER D COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

APPENDICES, CONTINUED

DANIEL J. O'CALLAGHAN, ESQ.
17 Battery Place
New York, New York 10004
(212) 222-4200
Counsel of Record and
Attorney for Petitioners
FEI, Ltd., John J. Fogarty.
and Jean Fogarty

88 pp

APPENDIX O - NOTICE OF MOTION FOR TRIAL UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK WITH MEMORANDUM ORDER ENDORSED DENYING MOTION, DATED MAY 3, 1993

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MEMO ENDORSED

OLYMPIA & YORK BATTERY PARK COMPANY and O & Y TOWER CORP.,
Plaintiffs,

- against -

INSURANCE COMPANY OF NORTH AMERICA PHILADELPHIA,
Defendant,

- against -

FEI LTD., et al.,
Third-Party Defendants.

85 Civ. 1238 (TPG)
NOTICE OF MOTION FOR TRIAL

SEAL:
U.S. DISTRICT COURT
FILED
APR 12 1993
S.D. OF N.Y.

RECEIVED IN CHAMBERS
OF CHIEF JUDGE THOMAS P. GRIESA

APR 14 1993

PLEASE TAKE NOTICE that the undersigned will move this Court before the Honorable Thomas P. Griesa, on the 29th day April, 1993, at 10:00 A.M. or as soon thereafter as counsel may be heard for an Order (i) pursuant to Rules 16 and 40 of the Federal Rules of Civil Procedure granting Third-party Defendant FEI, Ltd., John J. Fogarty and Jean Fogarty ("FEI") a trial with precedence upon FEI's claims against plaintiff, Olympia & York Battery Park Company and related/affiliated companies ("O&Y"), and (ii) for such other and further relief as to the Court seems just and proper.

Handwriting:

Motion denied.
So ordered
5/3/93 Thomas P. Griesa
U.S.D.J.

APPENDIX P - EXCERPTS FROM FEI'S MAIN BRIEF TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED SEPTEMBER 10, 1993

STATEMENT OF FACTS .

FEI's claims - those initially sought to be presented during the O&Y Trial - have been preserved for trial as *severed* and ruled by the Court to be "out of the case". A review of the Trial Transcript so records:

I FEI Witness, Managing Director, Francis Guilfoyle - Direct
[March 8, 1988]

MR. O'CALLAGHAN: Attached [to **Ex 317**]... was another exhibit, part of the complaint... identify it as **318** ....

MR. O'CALLAGHAN: [T]his document has been part of the pleadings for three years... (A 106-07).

THE COURT: [I]ntroduce the cover page... this was a memo.... to O&Y, July 5, 1985 covering many items... (A 108).

MR. O'CALLAGHAN: [T]he other pages are support for the other claims that we had... that other witnesses will address the other claims....

THE COURT: All of these things, do they pertain, does all of this pertain your damage claim?....

MR. O'CALLAGHAN: It is my understanding that these pages, the pages right behind Mr. O'Reilly's summation itemize the items... (A 109).

THE COURT: [318] is marked for identification, and give it all to the jury... they see the first page and they will mark it 318A, and page 21 they will mark 318 B...

(Defendants Exhibits 318 A and 318 B... were received in

evidence). (A 111-12).

Q. Mr. Guilfoyle, can you identify 318?...

A. It's our best estimate *at the time* of the moneys owed to us by O&Y. (A 113).

II FEI Witness, Chairman, John J. Fogarty - Cross
[March 15, 1988]

THE COURT: *...Now, what I am going to rule is this*:

That from here on out until further notice, the *evidence is to be directed*, both direct-examination and cross-examination, to the *stone problem and the changes in building priorities*....

All further cross-examination of Mr. Fogarty, Sr., will be directed to that point, and those points and *those points only*. All further presentation of additional witnesses by *FEI will by limited to those points*... (A 116)....

[I] am going to... *tell the jury* that I have ruled in this way.... I want to have them and the attorneys *focus only the two problems* which really they will have to decide, and *only those problems will resolve this case*.

[T]hey are going to be asked to *switch their consideration* for the time being away from these issues. They will hear about the stone problem and the switch in priority problem,... and that's the way we will proceed. (A 117).

MR. O'CALLAGHAN: The other point, your Honor,... *the claims we began to develop*..., the excess wage claim..., B and D issues which began to be presented, *they are going to be put on the back burner*?

THE COURT: *Yes, absolutely*. (A 118-19).

(Jury present).

JOHN J. FOGARTY, resumed.

THE COURT: In my view *the case rests... on this question of the stone problem and the switch in priorities. That's as far as you are concerned right now....* (A 124).

* * *

THE COURT: *Does the defense case rest?*

MR. O'CALLAGHAN: *To the extent*, your Honor, *you have limited the trial* to the issues --

THE COURT: *I understand.*

MR. O'CALLAGHAN: Yes, we do. (A 128).

* * *

III "You won't have a jury".

[March 23, 1988]

MR. O'CALLAGHAN: More or less in midstream in the case... you essentially directed that we all turn out attention to the stone to hit heart of the case.

Now, FEI at that time was right in the middle of presenting its claim..., (A 129) but all that was abbreviated.

In fact, it wasn't presented, and so I have reflected on this because in order for FEI to present these claims, it is going to take some time....

THE COURT: I'll tell you, Mr. Callaghan, you are not going to have a jury.

MR. O'CALLAGHAN: Pardon me?

THE COURT: *You won't have a jury.* I freely concede that in order to get this case confined to what I think... you can't have a lot of people sitting in a jury who are feeling like they are chained to their seats and they are totally unwilling, you don't want that.

Now, I was pretty confident that in order to get this case into a span which was workable, that we had to somehow arrive

at some reasonable definition of the issues.... (A 130-31).

Now, *as far as your counterclaim for damages* for breach of contract, if you are telling me that you need several more days to present that, I'm telling you you don't have a jury, and *I will simply sever it and we will call another trial*, because it is not practical....

[S]o we have limited the issues, and so be it. I'm, not going to have this jury sitting here and listening to the mutual recriminations about everything that went on in the summer of 1984 about the handling of the sewage, the garbage, the lights, the tools, the welding machines, the elevators -- it is not going to be done.

MR. O'CALLAGHAN: ...Defendants' 317 is in evidence and we were sort of in the middle of presenting--

THE COURT: I didn't cut you off as far as 317.

MR. O'CALLAGHAN: I think you did, judge.

THE COURT: No, I didn't.

MR. O'CALLAGHAN: [M]r. Fogarty, Sr. was testifying about it and we had some voir dire, and the jury was asked to leave, and that's where the focus of the case shifted to stone again.... (A 131-32).

THE COURT: ...I don't think you were ever cut off from presenting--....

[I] don't believe you were ever cut off or prevented from showing....

Now, you look at the record, and if you were prevented and cut off, well, I will stand corrected. *What I was trying to cut off wasn't your showing the back-up for your damage items*.... (A 133-34).

But you can read the record over and *correct me if I am wrong*. The point is that you have rested your case and, I don't

think you were prevented from putting anything on about your damages that you wanted to put on.

THE COURT: Before you go any further, you study the record. A 135-36.

MR. O'CALLAGHAN: I have an understanding of it... and I represented at that time we had claims to discuss, including the anticipatory breach on Building B and D, and when I rested my case, it was on the understanding it was being *rested on the A and C stone issue alone*.

THE COURT: I think you better re-study the record. I don't think that's a faithful recital of it....

One way or the other, *we will get this jury instructed by the end of the day tomorrow*. (A 136).

(Trial resumed)

IV Severance: "The Third-Party claims [are] really out of the case"

(In open court, jury not present) **[March 24, 1988]**

MR. O'CALLAGHAN: Last evening we had some discussion about FEI's claims and I went through the transcript.... I made three pages.... [A 116-119].. close on [A 128].

THE COURT: All right.

(Pause)

THE COURT: *Well, you are absolutely right. Absolutely right.*

So what do you propose?... (A 137).

MR. O'CALLAGHAN: [I] have no choice but to ask that they be *severed and tried at a later time*.

THE COURT: You are certainly right in your memory of the transcript, and you have shown it to me. And we have to deal

with it in a sensible way.... (A 138).

And what is *O&Y's position* on that?

MR. SELTZER: *We agree to the severance of FEI's third party claims against O&Y.* We agree to the severance.

THE COURT: The *application is granted on consent*....

MR. O'CALLAGHAN: One further point, your Honor. May I ask that the court provide some *instruction to the jury* about FEI's claims in whichever way is appropriate.

THE COURT: *Sure. I will do it.*

MR. O'CALLAGHAN: They will be held in abeyance.... (A 139).

THE COURT: ***The matter of the third party claims is really out of the case. I think it would be most confusing to bring that up***.

Let's bring in the jury. Thank you all very much.... (A 140).

* * *

THE COURT: All parties rest now?... (A 141).

MR. O'CALLAGHAN: With the only reservation we had --

THE COURT: What we discussed this morning?

MR. O'CALLAGHAN: Yes. (A 142).

* * * * *

FEI's claims as so "severed", "out of the case", "confusing", thus, removed from jury consideration, thereafter were precluded from even an offer of proof. In/about October, 1988, notwithstanding objection, notwithstanding prejudicial, and

notwithstanding that no similar imposition was required of O&Y, FEI was ordered promptly to document "chapter and verse" support for its claims. A 217-19. In compliance, presentation was made in November, 1988, (A226-310), with full reliance and "reservation of all rights" as contained in "*prior FEI pleadings*", in other written submissions and upon the effect of the Court's trial preclusion rulings, as above referenced and for "reasonable overhead and profit". (A 226-27).

FEI's Ex. 318 is a compilation of FEI claims as of July, 1985, which were attempted to be presented at the O&Y Trial with/through witness elaboration and other supporting evidence, but were not so presented into evidence and/or were withdrawn from jury consideration upon the Court's ruling for severance. A 370-85. Three (3) years earlier, Ex. 318 had been presented in this dispute as "**Ex 2**" to FEI's Third-Party Complaint. A 24-39.

In substantial content, Ex 318 does not address claims for the "handling of the sewage, the garbage, the lights, the tools, the welding machines, the elevators", but rather evidences significant claims as known and itemized, e.g., by letter to O&Y at least as early as June 30, 1985. A 24-25, 370.

Subsequently, upon a November, 1988, Court direction to document "chapter" and "verse" its claims, FEI presented support for its claims, e.g., upon Buildings A and C near $900,000 for "overhead" and in excess of $1M for retentions, a "tax claim" in the amount of $1M, a Building B Tower claim in the amount of at least $473K, a Building D claim in excess of $800K and a defense (set-off) to O&Y's loan claim.(A226-310; i.e., exhibits for "overhead" and "retentions" claims, A 235-50; tax claim, A 251-65, 292-300, 306-10; Building B Tower claim, 277-85; Building D claim, A 301-05; loan set-off, A 266-76. Post-trial, FEI referenced its claim for at least $1,589,225, upon Buildings A and C for overhead and profit grounded upon trial evidence, e.g., O&Y Ex 15 admissions.See **infra, Point II**. A 286, 387. Repeatedly, FEI provided notice to O&Y of its claims (and years for discovery), viz.:

(i) FEI Controller letter dated June 30, 1985 (Ex 318; A 24-39, 370-85);

(ii) FEI Third-Party Complaint, Ex 2; A 24-39;

(iii) Trial Ex 318; A 370-85;

(iv) FEI Rule 16 counsel affirmation at ¶1: ("FEI provides this information with *reservation of all rights including contentions*, legal arguments and other matters addressed *in prior FEI pleadings*..." A 226-27; and

(v) FEI Rule 16 party affidavit, (Ex 318, pp 3-6; A 287-310).

As stated by FEI's Chairman, John J. Fogarty:

> "Upon a nearly six (6) week jury trial... O&Y was provided with more than full opportunity for presentation of its claims. Meanwhile, after it became apparent that O&Y's... claims for in excess of $13 million quickly and rightfully were evaporating before the jury, nonetheless, under Court direction, FEI's claims were severed upon assurance for a subsequent, separate trial... [A]t no time and under no circumstance was there any doubt... that the case was being presented to the jury other than exclusively upon O&Y's claim for "overage"... against which FEI was limited expressly to presentation of some defenses...*[F]EI was limited by the Court to a defensive action, not to presentation of affirmative claims*. Notwithstanding a jury verdict which vindicated FEI... nonetheless, immediately thereafter, commencing in October, 1988, repeatedly and unfairly the Court characterized FEI's contract performance as in "default"....A 408. (Emphasis added).

Subsequent to numerous telephone and other verbal communications commencing immediately after FEI's November, 1988, submissions and continuing until abandoned by O&Y, the parties conferred and corresponded concerning settlement, eventually concerning a settlement meeting of principals. A 386-96.

Significantly, FEI provided notice of its Building D claim, one in excess of $800K, by letter dated July 5, 1985, the notice annexed to FEI's Third-Party Complaint:

MONIES OUTSTANDING AS AT 30/6/1985

* * *

16.	Pending Change Order - Production Time Overrun Building D/B...	307,896.55
19.	Pending Change Order - Unfilled Containers Building D/B	118,088.82
20.	Pending Change Order - Accommodations/Office Facilities	10,775.15
21.	Pending Change Order - Granite Disruption/ Associated Costs...	50,458.58
25.	Pending Change Order - Excess Shipping Costs/ Building D... and	352,191.00
28.	Pending Change Order - Hastings to Buildings D Jobsite Costs....	12,812.50

* * * * *

(A 24-27, 371-73)

O&Y's uncontested reluctance to address for settlement virtually all Building "D" claims is referenced in one of the several "settlement analyses" exchanged between the parties referencing O&Y's "deal-breaker" insistence concerning O&Y's $1.9M of Building "D" claims, those never set forth "chapter and verse" nor so required by the Court. A 365, 386-87, 409-10). In addressing FEI's $800,000 Building D, claim, uncontestedly, Fogarty stated:

> During the preliminaries to the settlement discussions, O&Y indicated an unwillingness initially to address FEI's

> significant claim (approximately $800,000) relating to Building D, exclusive of retention, as in sum and substance is itemized in Ex2, annexed to FEI's Third-Party Complaint. This claim at O&Y's insistence was *to be considered separately* by the parties at a settlement discussion subsequently to be scheduled. Thus, in the November 30, 1988, FRCP Rule 16 Affidavit, at ExF, deponent made reference with clarification to this understanding in context of the "B/D Gatehouse". [A 289, 302-05] This building D claim in excess of $800,000 as contained in FEI's pleadings and trial Exhibit 318 has not been withdrawn or abandoned but remains pending, as *severed* in 1988 by the Court, notwithstanding O&Y's unwillingness to address the claim's existence at settlement or otherwise and the Court's... insistence for its 1993 dismissal rather than... trial of... this claim, as severed. A409-10. (Emphasis added).

In consequence of O&Y's refusal to discuss settlement, by letter January 7, 1992, FEI requested a conference, eventually held on February 13, 1992. A 396. At the conference, O&Y represented that it would not settle FEI's claims at any value, rather urging dismissal of the claims. Thereupon, in conclusion, the Court scheduled a trial of FEI's claims for the last two (2) weeks of August, 1992. A397. Thereafter, FEI did not receive any communication from the Court, nor in any manner communicate to the Court until July 28, 1992, when FEI wrote advising of its readiness for trial, requesting from O&Y a notice of any change in the financial status of O&Y. A 398.

On August 17, 1992, FEI appeared for trial. O&Y was not in attendance. A trial in another matter was in progress and FEI was advised that a trial of FEI claims was not scheduled to proceed. This was the first and only communication from the Court that the February 13, 1992, Court direction for an August, 1992, two (2) week trial of FEI's claims had been rescinded. A 399-400. Subsequently, FEI received a copy of O&Y's "By Hand" to the Court letter dated August 17, 1992. A 401. A conference was held on September 30, 1992. At the conference and in subsequent letters, FEI urged that the matter proceed to trial; O&Y declined to consider settlement. A 402-05. * * *

APPENDIX Q - EXCERPT FROM O&Y'S OPPOSITION BRIEF TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED OCTOBER 13, 1993

* * *

C. The November 1988 Claims Were Not Severed

FEI predicates its appeal entirely on the fact that the district court severed FEI's Third-Party Complaint. However, FEI proceeded to present all of its third-party claims on Buildings A and C to the jury. The Third-Party Complaint consisted of third-party claims against O&Y for amounts allegedly owing on all four buildings. The amounts claimed in that pleading with respect to Buildings A and C consisted of claims for an additional $6,846,857 beyond the $14.1 million contract price, including a claim for excess wages ($4,068,168), a change in schedule ($1,441,687), stone repair ($898,073), and marble ($438,929). FEI claims that the effect of the severance was to preclude FEI from arguing to the jury the merits of these individual claims. However, FEI was *not* precluded from presenting evidence and argument to the jury that O&Y actually agreed to pay for all these claims.

Thus, even though the Third-Party complaint was itself severed, the summary of FEI's Claims in that pleading for $6,846,857 beyond the $1.4 million contract price *was* admitted into evidence (as Exhibit 317). (A 23). Indeed, the summary of FEI's claims was Exhibit 1 to its Third-Party Complaint. (*Id.*) Therefore, even though the Third-Party Complaint was severed, FEI suffered no prejudice because the entire amount of its third-party claims on Buildings A and C *was* submitted to the jury anyway. Furthermore, the jury effectively awarded FEI *more* than the amount it was claiming, thereby disproving any possible claim of prejudice. In short, while FEI's complaint was nominally severed, FEI presented all of the evidence of its damage claims to

the jury -- and won![24]

FEI's suggestion that it *was* precluded from introducing evidence on Buildings A and C because another exhibit, Exhibit 318, was not admitted (FEI Br. at 13) is frivolous. Exhibit 318 is a 15-page collection of documents purporting to back up the summary of FEI's claims on Buildings A and C which *was* admitted into evidence (as Exhibit 317). Thus, for example, Exhibit 317, which was submitted to the jury, lists an FEI claim for "excess wages" in the amount of $4,068,168. The exact same claim appears in Exhibit 318, which was not submitted to the jury, at pages A 31-32, under the heading, "INVOICE/CHANGE ORDER -- A & C -- RE EXCESS WAGE COST" in the amount of $4,068,168. Similarly, Exhibit 317 (in evidence) also lists an FEI claim for "priority change" in the amount of $1,441,687. The exact same claim appears in Exhibit 318 at page A 28 under the heading "REQUEST FOR CHANGE ORDER" due to "change of priority from Building "C" to Building "A" in March 1983" and seeks a total of $1,442,687.[25]

In short, FEI's complaint about Exhibit 318 being "withdrawn from jury consideration upon the Court's ruling for severance" caused no prejudice to FEI whatsoever because the same information with respect to Buildings A and C *was* presented to the jury in Exhibit 317.

---

[24]If FEI contends the November 1988 claims were *not* set forth in the Third Party complaint -- and thus not part of the summary presented to the jury -- those claims would now be barred by the statute of limitations. In New York, the statue of limitations for breach of contract actions is six years. (CPLR 213). The November 1988 claims were not asserted in any pleading and concern payments FEI contends O&Y should have made by April 1986. Assuming these claims were not, in fact, covered by the jury verdict, the statute of limitations on them would have run in April 1992.

[25]Exhibit 318 was excluded because, among other things, it included back-up for FEI's B and D claims which had been severed from the trial. The trial only concerned claims on Buildings A and C.

Finally, it should also be noted that FEI never complained at the trial that it had evidence of *any* additional claims which it was not permitted to introduce. To the contrary, the trial judge made clear that FEI was never cut off from presenting its damage claim, and FEI's counsel admitted that all of FEI's damage claims were set forth in Exhibit 317 (in evidence) and his only complaint was that, because of some confusion, some of the backup for the $4,068,168 excess wage claim on Exhibit 317 did not somehow get admitted. (A 132-34).

* * *

APPENDIX R - EXCERPTS FROM FEI'S REPLY BRIEF TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED OCTOBER 27, 1993[26]

* * *

POINT II: The O&Y Trial Was Not About "What O&Y agreed to pay"

FEI does *not* seek to be compensated "twice" for the $7.8M monies advanced by O&Y during the "pre-termination period," i.e., November, 1984 - April, 1986, advances concerning which the district court determined": [i]t's quite obvious the jury didn't award a penny of that." (SA 121). Rather, FEI seeks a trial, **inter alia**, predictably upon uncontested claims, FEI's "A" and "C" claims for overhead ($900,000), taxes ($1,000,000) and retentions ($735,000), claims *not* included in any of the pre-termination monies advanced by O&Y, monies advanced, rather, self-interestedly for O&Y's own account.

These claims are supported in the district court ordered FEI "chapter and verse" November, 1988, submissions (the "**Chapter and Verse Submissions**"), those presented by FEI's Chairman John J. Fogarty ("**Fogarty, Sr.**") and through FEI's counsel, the latter submissions adopted by Fogarty, Sr. "as his own sworn statements". Thus,

> **Buildings A/C Claims** -
>
> (a) During the [pre-termination period]... O&Y failed... to pay... FEI's *overhead* expenses,... *as agreed*, ... O&Y's advances... prior to termination included monies *only* for FEI vendors, field payroll and partial tax obligation, but *not for FEI overhead*, which FEI paid from

---

[26]The prefix "A" is to the Joint Appendix; the prefix "SA" to the Supplemental Joint Appendix. Citations to the trial transcript which were not included in either appendix appear as "T."

other income sources... [F]EI incurred overhead expenses in the approximate amount of *$900,000* for which FEI seeks reimbursement.

* * * *

(A 227-28).

(b) Similarly, FEI presents a claim in the amount of $1M for... *employment withholding .tax assessments* imposed upon FEI... in breach of O&Y commitment to compensate FEI for this obligation.... Similar to the jury and Court conclusion that FEI did not expect to return to O&Y pre-termination advances, FEI did not continue on the Project anticipating that it and its officers *alone*, would be held accountable for the assessment, a liability *FEI need not have incurred* if simply FEI had abandoned the Project in Fall, 1984....

* * * *

(A 229-30).

Retentions -

FEI presents a claim for *Retentions* earned on Buildings... , as follows:

A/C	$ 735,213	
"B"	49,683	
"D"	261,886	
Wintergarden	12,368	
	$1,059,150	
	- 456,251	(Loan)
Retention Monies Due FEI	$ 602,899	

(A 232).

[O&Y] PX 15 (A 104) admits that the amount of *$1,589,225* was due FEI upon the contract but *not* paid, a substantial portion of which amount is comprised of the $735,213 A/C Retention. The other monies withheld by O&Y identified on Exh. 15, the amount of $854,012, are monies earned by FEI for which requisitions were submitted but for which O&Y did not compensate FEI.

* * * * (A 233).

FEI's Chairman, Fogarty, Sr., added:

> ....[I] was assured repeatedly that FEI's *overhead* expenses then being incurred for Buildings A and C would be reimbursed to FEI... directly by O&Y and/or through the monies FEI would earn in activity upon Buildings B, D, and Wintergarden, contracts which O&Y promised to FEI at profits which would absorb the overheads advanced by FEI on Buildings A and C....
>
> Likewise, FEI was repeatedly assured that its *Retention* monies earned through 1984 and later, funds in excess of $700,000, would be returned to FEI upon completion of the Project. Similarly, I repeatedly was assured that FEI's withholding tax obligation,... in the approximate amount of $900,000, would be satisfied by O&Y, a significant liability... which O&Y has failed to honor. Simply, without these assurances I would not have permitted FEI to continue the Project as it is obvious that neither I, nor my son, would have incurred significant and increasing tax liability nor worked below cost, nor abandoned $700,000 of earned Retention monies when we could have withdrawn from the Project then and there, found other work and thereby avoided at least some of these liabilities and obtained the Retention... (A 288).
>
> [O]&Y's trial Exh. 15 does not include any provision for Retentions... [F]EI earned $700,000 prior to Fall, 1984. O&Y still has the money or is accountable for its misuse. O&Y is *not entitled to any "credit"* for its apparent wrongful choice to use monies rightfully belonging to another. (A 290) (Emphasis added).

Notwithstanding the district court's view that "O&Y has more than made up this deficiency" (A 190), indisputably the November, 1984 - April, 1986, pre-termination advance was for "new work", was performed at O&Y's request and for O&Y's benefit, thus, for O&Y's account. FEI's $700K retainage was

earned during an earlier period, i.e., February, 1983 - November, 1984. (A 237). O&Y's *subsequent* "pre-termination advances" were not documented by O&Y as "payment" for retainage, were not *pled* in a "payment" affirmative defense and may not now be "credited" retrospectively to O&Y's benefit, perhaps grounded upon a district court "balance of the equities" because O&Y lost a $13.5M litigation. More, *O&Y has conceded* that the A and C $700K retentions were neither "credited" to FEI nor part of the now posited "Everything O&Y agreed to pay" theorem.[sic] Convincingly, in O&Y's **Answer and Counterclaims**, to FEI's Third-Party claims, dated July 31, 1986, ("**O&Y's Answer and Counterclaims**"), O&Y included fourteen (14) affirmative defenses, none of which may be identified as a "payment" affirmative defense, rather one as a *concession of non-payment*! In allegation ¶51(a), O&Y admits that the A and C retention amount, $700K, was intended to be tried *separately* as an off-set to O&Y's Ex. 15 damage submission. Definitively, O&Y anticipated in 1986 that the trial simply *could not* be about "what O&Y agreed to pay", but rather that FEI's retention, an "*acknowledged adjustment*", would have to be accounted for, would have to be *returned*, notwithstanding any "advance" in its own interest O&Y might provide:

> 51. As a result of FEI's breaches, O&Y has suffered damages...
>
> > (a) not less than $7.2 million,... representing amounts that O&Y *has paid to FEI* in excess of the contract amounts calculated under the Agreements. It should be noted that *this amount may be reduced at trial to reflect the possible release of retainage, credits and other acknowledged adjustments*.
> >
> > (O&Y's Answer and Counterclaim at ¶51(a)) (Emphasis added).
>
> * * *

Simply, FEI was *not* required to "reserve" an exception to the jury verdict concerning these claims as they had been *severed*

mid-trial at the explicit order of the district court and upon the explicit consent of O&Y. In the conclusive words of the district court:

> THE COURT: ***The matter of the third party claims is really out of the case. I think it would be most confusing to bring that up.***
>
> Let's bring in the jury. Thank you all very much.... (A 140).

It is apparent from the Record, that the March, 1988, severance was of FEI's *claims*, not merely as alleged in FEI's November, 1985, pleadings, but actually as ripe for presentation at the March, 1988, O&Y Trial. At the time of severance, the claims included additional A and C damages in consequence of O&Y's 1984-1986 conduct, i.e., aggravated overhead, tax and retention claims, as well elaborated B and D claims. Definitively, FEI's Third-Party Complaint provided adequate 1985 and continuing notice to O&Y,i.e., FRCP Rule 8 "Notice" pleading, see for example, Third-Party Complaint, ¶¶s 10 and 20. (A 13, 16). Definitively, none of these claims were presented at the O&Y Trial, all had been severed, all had been *ordered* "out of the case".

It is inconceivable that anything other than the prejudicial, deliberate severance of all FEI claims occurred during the O&Y Trial and that now, retrospectively, there has been posited in support of an erroneous dismissal the contention that the jury decided the case upon the theory of "All that O&Y agreed to pay", notwithstanding that no one heard, argued or charged upon such theory, nor was such theory contained in either of two (2) lengthy Opinions or therein remotely referenced.

* * *

Now, as Defendant, Insurance Company of North America, Philadelphia ("**INA**") and its $10.5M bond exposure have been dismissed, O&Y contends differently so as to support another "inconvenient afterthought", (T 3391), the accordion-like expansion of actual issues before the jury - "default" and "damages by reason of such default" (A 313) - to an "All O&Y agreed to pay" proposition, so as to envelop FEI's claims into this new theory, one not contended, indeed, not heard, until years after the jury had been excused.

....The district court instructed the jury concerning the absence of O&Y witnesses, e.g., Farb and Blau (also Alberton, Norris, Gestetner, etc., or any Reichmann), the testimony attributed to them characterized as "admissions", adding concerning Interrogatory No. 3, this essential point:

> [T]he only thing I will say is that there is *Exhibit 15*. (A 104). 15 is a summary of many underlying pieces of evidence, at least it is arguably a summary, and it's up to you *whether it is an accurate summary*, and it is up to you to determine *whether payments and expenses* over and above the contract price *were reasonably incurred. If they weren't incurred or if they were simply extravagant*, they are not reasonably incurred....
>
> (T 3296-97) (Emphasis added).

Also, the court charged concerning witness credibility, adding:

> *You are free to accept all the witness's testimony, reject all or accept part and reject part. That's up to you.* T 3299.

Simply and conclusively, the jury believed FEI witnesses about O&Y assurances and did *not* believe O&Y Exhibit 15's claim for reimbursement of pre-termination expenses. Simply and conclusively, the jury did not "credit" to O&Y reimbursement for expenses which either "weren't incurred" or "were simply extravagant"....

"Simply and conclusively", the jury concluded in their answer to Interrogatory No. 3 that O&Y had incurred *for O&Y's account* all such contended pre-termination expenses, as well, upon waiver, the jury concluded that there was no right to re-imbursement....

POINT III: There Was Substantial Performance, Not Default, By FEI Upon the "A" and "C" Agreements

In Opinion II, the district court stated:

> [U]nder the evidence, the jury could well have found that FEI's financial problems in the *fall of 1984* related to its difficulty in meeting O&Y's *increased demands*, rather than requirements under the original contract, and that *what occurred was an alteration and adjustment* of the contract *rather than a default* by FEI. Of course, the jury found that at some point there was a default by FEI resulting in damages to O&Y of $600,000. The jury was not asked to specify the time of the default, and no party to this action can now complain about the lack of such a specification. It can simply be said that *the jury would have been justified* in finding the *date of default* as being the *time of the termination in April 1986* or some time thereabouts.
>
> * * * (A 317) (Emphasis added).

In April, 1986, O&Y had incurred expenses approximating $22M for the A and C project. Definitively, the jury did not award a "penny" of such "pre-termination expenses" (SA 121), i.e., the $7.8M O&Y advance from the November, 1984, "formal" Adjusted Contract Price amount, $14M, to the April, 1986, *default and termination date* amount, $22M. Thus, the $600K jury damage award - 2.7% of the April, 1986, district court "adjusted" Adjusted Contract Price, $22M - was an insubstantial "default". Definitively, FEI substantially had performed as of April, 1986. Accordingly, O&Y is in breach of the A and C Agreements grounded upon an April, 1986, termination, one wrongfully exercised notwithstanding contemporaneous FEI substantial performance.

Having substantially performed, FEI is entitled to recover... [citations omitted].

It was a condition of O&Y's April, 1986, termination that O&Y have acted in good faith. [Citation omitted].... An owner who terminates the contract upon grounds of material breach must not (i) have breached the agreement, (ii) waived a contractor breach, or (iii) interfered with or prevented the contractor's performance. [Citation omitted].... In all three (3) categories, O&Y has failed. FEI's A and C claims, as severed, may proceed to trial.

POINT IV: O&Y Misrepresentation of the Record.

O&Y misrepresents an otherwise clear record upon this appeal. **First**, the trial presentation of FEI's Ex 317, a November, 1985, Buildings A and C "Recap of payments" (A 23), was preliminary to the severance. Ex 317 and Ex 318 (A 24-39, 370-385), collateral supports for the 1985 damage calculations, upon severance *substantively* were withdrawn from the jury, i.e., were ordered "out of the case". These 1985 exhibits could not have included FEI claims for A and C damages sustained principally November, 1984 - April, 1986; for example, (i) for "overhead" which the Chapter and Verse Submissions established were to be reimbursed through earnings upon the "Buildings B, D and Wintergarden Contracts (A 288), for retentions to be "returned to FEI upon completion of the Project (A 288), and (iii) for a tax obligation to be "satisfied by O&Y... which O&Y... failed to honor...". (A 288). More, O&Y's suggestion for "confusion" (O&Y Br. at 19) is inaccurate; definitively, in March, 1988, in open Court, the district court acknowledged that he had *been corrected*, that FEI's Third Party claims, i.e., *not* merely as stated in a 1985 pleading, but rather as elaborated through March, 1988, fact and circumstance, had been severed. (A135-140). O&Y's appeal contentions concerning FEI Ex's 317 and 318 (O&Y Br. at 18-19), are belied by the record: during jury deliberations, O&Y railed against the jury's possession of these exhibits grounded upon O&Y's contention for the substantive absence of any possible jury reliance, *because* severed:

> MR. SELTZER: This packet of 318A was submitted to the jury by defendants with a whole bunch of other damage exhibits attached to it showing millions of dollars of damage for which there was ***never testimony nor admission*** of the document into evidence.... (A 165).
>
> [T]he cover page which shows what it is will be 318 A in evidence... but A has a damage figure on it for which ***there was never any testimony, never any connection. The witness never got back to it***. And it's ***an amount on which there was nothing in the***

summation, no reference to it, no cross-examination on it.... (A 167).

[I] recall 317 was the enumeration next to which the ***jury made asterisks***, because they were ***not to consider certain items***.

Your Honor, this is such vital material....

THE COURT: I don't think it is vital at all... (A 168) and they were told to ***make asterisks***, and they were ***told that they could not consider this***...

[N]o, Mr. Seltzer. I'll tell you, the start of this exercise, which led into 318, was, of course, 317. They were told to put asterisks by three of the four figures that appear under this little section called Claims. Marble priority change, excess wage, stone repairs. And they were specifically told that those are items that were ***not to be considered by them***. (A 169).

[T]here is nothing they could do with 318 A to damage you. (A 172) (Emphasis added).

* * *

Fourth, FEI's A and C ***retention claim, $700K, was not presented to the jury***: FEI's closing argument (T 3061-3115) presented a summary of the myriad facts, witnesses and documents particularly relevant to an enormous project and a resulting O&Y $13M damage claim for FEI default which had occurred during the period 1982 - 1986, events which resulted in a nearly six (6) week trial and three (3) day jury deliberation. The "retention" reference in closing argument was one of many such "facts" addressed in this chronology. Significantly, O&Y omits the concluding retention reference:

[T]he 700,000 is to be repaid to FEI, retention money, repaid to FEI, the rightful owner, sometime about February of '85, according to the schedule.

What happens in February of '85, however, is

> Olympia & York does not repay FEI. It sues the bonding company and holds onto the money. (T 3108).

Notably, the jury was ***not*** requested by any counsel, nor charged by the court, to "credit" O&Y with ***any*** retention, nor to award any retention amount to FEI - the claim having been "severed". See also:

> [S]implest way for FEI to present the closing argument is to address the witnesses and documents you observed... (T 3061);
>
> [O]&Y's failure to satisfy... obligation to supply the stone. That's what we have asked you to concentrate on. That's what the judge asked earlier in the case. He provided some impetus to move the case with a bit more alacrity, because their are numerous other issues before us, but for the sake of today's and the past few weeks' resolution, it is about stone.... (T 3062);
>
> [I] think it is important to reflect on the documents you have seen throughout this case, I just discussed a great summary of things. (T 3111); and
>
> [F]EI did not default on this contract. FEI stayed with the contract. Olympia & York failed to perform. Olympia & York has no one to blame but themselves for this problem. (T 3115).

Fifth, O&Y's assertion for "no defense" to the Bagnelstown loan, also, is belied by the Record:

> **Bagnelstown Loan**
>
> FEI presents as a defense to the *Bagnelstown loan*, the *defense of payment*. The loan terms authorized satisfaction of the balance payable *from* retention monies... (A 230).
>
> [T]he loan balance was or should have been satisfied from

> the authorized A/C Retention in accordance with the loan conditions... [O]&Y's contention that it was authorized to apply Retention to whatever use O&Y chose is prohibited by the Contract... [w]as at O&Y's own risk. [C]redit to O&Y of FEI Retentions,... authorizes conversion of FEI earnings, unjustly enriching O&Y... (A 231).
>
> Although prepared to present evidence in opposition to the loan claim, *FEI was precluded from presenting any evidence* relating to this issue, the Court ruling... that all further FEI evidence... address issues relating exclusively to stone and priority switches (T 2210, 2223)... [T]his claim remains available for final determination between these parties at the trial of FEI severed... claims.... (Chapter and Verse Submissions, A 232).

Consistently, FEI's defense of payment has been presented, indeed, has been voluminously documented.

Sixth, at the February 13, 1992, conference, the district court initially scheduled a trial of FEI's Third-Party claims for the first two (2) weeks of August, 1992, i.e., August 15-31, 1992. At FEI counsel's request, the court then re-scheduled the trial to/until the last two (2) weeks of August, 1992. Notably, neither O&Y nor the district court responded to FEI's July 28, 1992, letter which confirmed the scheduled trial commencement date. (A 397-98). On December 23, 1992, the district court conceded the scheduling of trial concerning FEI's claims, however, adding:

> [I] finally put it down for trial and *then we had a conference*...., (A 340).

However, notwithstanding this added statement, there did *not* occur any such conference between February 13, 1992, and the August 15, (or 17), 1992, scheduled trial commencement date.

* * *

APPENDIX S - TRANSCRIPT OF PROCEEDINGS BEFORE THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED DECEMBER 22, 1993

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

OLYMPIA & YORK BATTERY CO., et al.,
Appellants,

- against -

FEI Ltd., JOHN and JEAN FOGARTY,
Respondents.

OLYMPIA & YORK V. INSURANCE COMPANY
OF NORTH AMERICA

Index No. 93-7547

40 Foley Square
New York, N.Y. 10007

December 22, 1993
10:30 a.m.

BEFORE:

HON. RALPH K. WINTER, C.J.,
HON. WILLIAM H. TIMBERS,
HON. JOSEPH M. McLAUGHLIN.

APPEARANCES:

Messrs. KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
Attorneys for appellant Olympia & York Battery Co.
425 Park Avenue
New York, N.y. 10022

BY: ROBERT BERNSTEIN, ESQ.,

DANIEL F. [sic] O'CALLAGHAN, ESQ.
Attorney for respondents
17 Battery Place
New York, N.Y. 10004

***

JUDGE WINTER: We'll hear Olympia & York against FEI.

JUDGE TIMBERS: You're Mr. O'Callaghan?

MR. O'CALLAGHAN: Daniel O'Callaghan for the appellants FEI, Mr. and Mrs. Fogarty. Good morning, your Honors.

JUDGE TIMBERS: Let me ask you something, not to be facetious, you attacked the district judge in the way he handled this case.

MR. O'CALLAGHAN: I can't hear you, your Honor. I'm sorry, I can't hear you.

JUDGE TIMBERS: You, quite properly representing your client, attacked the district judge the way he handled this case. Now, did you hear that?

MR. O'CALLAGHAN: I'm having difficulty, your Honor, I'm sorry. You said there was difficulty with the district court judge, but I couldn't hear the rest of it.

JUDGE TIMBERS: What I want to know, if you can tell me, did Judge Griese do anything right in this case?

MR. O'CALLAGHAN: I think that the trial essentially was fair. I think that his severance of my claims was unfair. And that he has for whatever reason decided not to hear that again. But I think the jury verdict was correct. I think his opinions were fair. I think the trial was fair.

JUDGE McLAUGHLIN: Is it perfectly clear on the record that

your claim was severed?

MR. O'CALLAGHAN: It is clear to me, your Honor, definitively that my claims, FEI's claims, were severed. He said they were out of the case.

JUDGE WINTER: Would you give us the page number in the appendix where the severance occurred pursuant to the order?

MR. O'CALLAGHAN: Yes, your Honor, if you give me a moment.

JUDGE WINTER: I thought that would be at the tip of your tongue.

MR. O'CALLAGHAN: It's in the brief, your Honor.

JUDGE TIMBERS: You have to tell us which volume. You have two big, thick volumes.

MR. O'CALLAGHAN: On page 12 of my brief.

JUDGE TIMBERS: I don't care about your brief. I think you have some other questions. What page of the appendix does it appear in your brief?

MR. O'CALLAGHAN: 138 and 139, your Honor.

JUDGE TIMBERS: Something's wrong with the pagination here. Now that's part of the oral argument before Judge Griese, isn't it?

MR. O'CALLAGHAN: No, your Honor, this is at the trial. At the trial, my client was --

JUDGE TIMBERS: I want to make it very clear. I'm asking where in the appendix that appears. You said 138 and 139.

MR. O'CALLAGHAN: Yes, your Honor. In the appendix, the severance of FEI's claims occurred during the trial.

JUDGE TIMBERS: Read the words that you rely on at 138 and 139. Well, I don't want to waste a lot of time. I don't see what your problem is.

MR. O'CALLAGHAN: Yes, your Honor.

At 138, I indicate to the judge that I have no choice but to ask that the third party claims be severed and tried at a later time.

And he says, the judge says, "You are certainly right in your memory of the transcript and you've shown it to me." And then we went off the record.

And the judge said before we went off the record, "Mr. O'Callaghan made an application to sever the FEI counterclaims. And I say third-party claims, he says third-party claims."

And the judge says, "I conferred with counsel on O&Y's position and they agree," and the judge says, "The application is granted upon consent."

At a later time he stated, the judge did, that the third-party claims were out of the case; that he granted the severance and would give me another trial on my claims. And that never did occur.

And then in November of '88, he directed that I submit what he called chapter and verse submissions analyzing all of my claims, which went back to the pleadings, which went back to the Exhibits 317 and 318, the development of that, and the severance at the trial.

The judge wrote the opinions, in both of the opinions -- well, let me just rephrase this. The judge grounds his dismissal upon what he characterizes as the basic issue as what O&Y agreed to pay.

Now, I submit, your Honor, that there was no argument upon what O&Y agreed to pay. There was no evidence upon what O&Y agreed to pay. There was no charge on what O&Y agreed to pay and there were two opinions, none of which referenced what O&Y agreed to pay. The opinions stated that the essential issue in the case was there a default by FEI and what was the loss and damage sustained by O&Y as a result of that default.

The judge clearly determined that the pre-termination advances by O&Y, not one penny of that was awarded by the jury, but that that was the result -- I had reserved five minutes, your Honor --

that the advances made by O&Y, what we call pre-termination advances were really for O&Y's own account was due to their own mismanagement. Post, post-termination advances, another 6 or $7 million.

The jury awarded $600,000 against that, which is only about 2 to 4 percent of the value of O&Y's entire contract. I submit that establishes substantial performance by my client. I'm entitled to proceed to trial on the A, C, B and D claims, which are millions of dollars.

The key circumstance here is that the verdict was concerning O&Y's claims because O&Y at trial, the judge severed the case at the pages I mentioned. He then directed that all evidence, all argument, all issues in the case, all cross-examination, all be directed to the stone issue and to the shifting and building priority.

The case became a defensive case at that time for FEI. All of our claims were put on the backburner, which is exactly what the judge agreed. And when I rested my case, it was under that understanding, under that direction. There was no Rule 49 allocation here. The claims had been severed and there's never been a trial. I submitted chapter and verse submissions at [sic] [after] trial. I appeared for trial. He directed that a trial occur in August of last year. He directed that. I appeared and prepared for trial. I came to the courtroom and the judge declined to grant the trial.

I reserved a few moments.

JUDGE McLAUGHLIN: The relief that you want is simply a trial on your, what you call, third-party complaint, in fact, your counterclaim, the claim that you have?

MR. O'CALLAGHAN: All my claims, your Honor, are on buildings A, B, C and D and they're quite significant. And A, C is in the millions of dollars and B and D is in the millions of dollars.

JUDGE McLAUGHLIN: That's all you want?

MR. O'CALLAGHAN: For trial.

JUDGE McLAUGHLIN: A trial on those things?

MR. O'CALLAGHAN: But I do have a claim here for judgment as well on the amount of money which Olympia & York really has retained. In fact, I characterized that at trial. Olympia & York contended, not disputed from deposition of a $14 million adjusted contract price and roughly paid FEI $12.5 million, therefore they had withheld $1.5 million.

Now I'll give them credit. I'll give Olympia & York credit for the $700,000 retention, but I submit due and owing now is about $900,000 because they have withheld the money. We worked for it. We earned it on A and C and they say that's the contract price, but they didn't pay it to us.

JUDGE McLAUGHLIN; What's the total amount you want?

MR. O'CALLAGHAN: It's hard, giving Olympia & York credit for the jury verdict and making certain adjustments, it's close to $4 million.

JUDGE TIMBERS: You've asked for a new trial before a different judge, right?

MR. O'CALLAGHAN: I think that would be appropriate in the context of the circumstances of the difficulty experienced during discovery, which was really very one-sided from my perspective, the judge's, I think, lack of interest in the case. He gave it six weeks, he effectively gave it an O&Y trial and not my case.

JUDGE TIMBERS: Well, I'm only speaking for myself, having been a trial judge, there's nothing more undesirable from a trial judge's standpoint than what you see in the last paragraph, the last sentence, "demand [sic] [remand] for trial before a different judge". I always thought you had to have a more substantial other basis for making that request that you're making here. Judge Griese probably made mistakes or errors, but that doesn't mean he's not competent to retry it. You say yourself it's a fair trial.

MR. O'CALLAGHAN: Fair trial.

JUDGE TIMBERS: He presided?

MR. O'CALLAGHAN: I have no doubt the trial was fair. My concern was the judge's lack of interest and the mechanisms by which he facilitated my necessity for taking this appeal. Characterizing the case as everything Olympia & York agreed to pay just was not true, not accurate.

And setting the case for trial back in last August having all that preparation and then when I appeared for trial, he just wasn't going to grant a trial and then six more months and I had to take an appeal while Olympia & York is in bankruptcy all over the world except New York. I think it would be fair before a different judge.

JUDGE TIMBERS: You made your point.

MR. O'CALLAGHAN: Thank you, your Honor.

JUDGE TIMBERS: Let me ask you, Mr. --

MR. BERNSTEIN: Mr. Robert Bernstein for the appellee.

JUDGE TIMBERS: What, if anything, did Judge Griese do right in trying this case?

MR. BERNSTEIN: Your Honor, I too have trouble hearing. What did he do that....

JUDGE McLAUGHLIN: Was right.

MR. BERNSTEIN: That was right?

Well, from Olympia & York's perspective, we had a six-week trial and although the jury found that FEI did default on the contract and although the jury also found that O&Y did not cause that default, the jury only awarded $600,000 in damages, even though it was undisputed that FEI received $7.8 million over and above the agreed upon contract price. And even though we had damage claims of $13.5 million over and above the agreed upon contract price.

Now, you're asking what did Judge Griese do that was right.

JUDGE TIMBERS: You're trying to uphold the decision of the

lower court?

MR. BERNSTEIN: That's right. But let me answer that by saying what we had to do here is we moved for judgment at O&Y and we lost. The judge upheld the decision of the jury by finding, in effect, that the jury had concluded that the agreed upon contract price was $22 million.

So what Judge Griese did that was right was he was consistent. When it came time to deal with FEI's claims, third-party claims, he concluded that they had been, at least on buildings A and C, they had been tried to the jury.

And with the Court's permission,I'd like to show you an exhibit from the third-party complaint, which is in the appendix at A-23. But I've blown it up because I think it will illustrate my point and the dilemma facing Judge Griese.

Your Honors, this is Exhibit 317 in evidence. It was Exhibit 1 to the third-party complaint and what it purports to do, this is FEI's document, and what it purports to do is recap the payments owed on buildings A and C.

Now let me say that the trial did deal solely with buildings A and C. There were four buildings at the World Financial Center. The trial dealt with buildings A and C and the reason for that was that O&Y had claims against a bonding company on buildings A and C.

So while it is true that there was a severance of FEI's claims, what is absolutely clear from this exhibit in that all of FEI's claims on buildings A and C went to the jury.

Let me show you how this exhibit shows that.

JUDGE WINTER: I just don't understand how you could have let that happen. I mean, if the claims are severed, why didn't you object to relevancy?

MR. BERNSTEIN: We did. And the judge felt that this went to the jury. We objected and he said, he allowed it in. He overruled our objection.

We wanted to take an appeal but we felt that when judgment, when the court entered a 54(B) judgment a few years ago on INA's dismissal, what happened in June of '89 was consistent with the judge's determination that the jury must have concluded that the

agreed upon contract price was $22 million.

And let me just illustrate --

JUDGE TIMBERS: Well, the judge made a finding of fact on this, on this severance issue, and the real question for us to decide is whether it was clearly erroneous.

MR. BERNSTEIN: Well, what he was faced with was FEI's total claim on buildings A and C was for --this was a $2 million claim, but it was predicated on a $14 million agreed upon contract price and claims relating to marble, priority change excess wage, stone repairs, which brought the total to $21.5 million.

JUDGE TIMBERS: Leave the figures out.

MR. BERNSTEIN: Sure.

JUDGE TIMBERS: The judge made a finding, if I understand you correctly, that buildings A and C which you're talking about those claims to overhead and tax reimbursement were considered by the jury and incorporated in this verdict.

MR. BERNSTEIN: Yes.

JUDGE TIMBERS: How could that have been?

MR. BERNSTEIN: Very simple. This Exhibit 1 --

JUDGE TIMBERS: In other words, those claims were not further actionable.

MR. BERNSTEIN: That's right. Those claims for excess, for taxes and the overhead, if you look at the third-party complaint which precedes this exhibit in the record, in fact, it's the first document in the appendix.

JUDGE TIMBERS: Stop referring back and forth. A very simple finding that the judge made and you say he was correct?

MR. BERNSTEIN: Yes, he was correct because the issue of

overhead, taxes was part of the third-party complaint that resulted in these claims and to the Exhibit 317 that went to the jury.

The basis for that is that the complaint says that that's the basis for these claims and this is what the jury had.

Now the judge said, "Look, it's clear to me that these claims were not taken out. There in no severance order that says that the claim for taxes, retention, or overhead is out of the case," and what he's looking at is this Exhibit 317, which was --

JUDGE WINTER: Looking at the exhibit, was the jury asked specifically to make separate findings on overhead, retention and taxes?

MR. BERNSTEIN: Not at all.

JUDGE WINTER: So we have irrelevant evidence that went in.

MR. BERNSTEIN: Excuse me?

JUDGE WINTER: So we have irrelevant evidence that went in and there's an assumption that the jury felt it was relevant and rendered a judgment on certain claims it wasn't told about.

MR. BERNSTEIN: Well --

JUDGE TIMBERS: That's what the judge said.

MR. BERNSTEIN: Excuse me? No, I understand. The judge said either these claims for retention, taxes and overhead were within what the jury found by essentially finding an agreed upon contract versus 22 million instead of 14 million, it either was included within the 7.8 or he says I can't, if it wasn't, and I can't tell one way or the other whether it was or it wasn't, then FEI never took it out from the jury's consideration. And in order to take it out from the jury's consideration --

JUDGE WINTER: It's not up to FEI to take something out of the jury's consideration, it's up to the judge.

MR. BERNSTEIN: The judge didn't do it either.

JUDGE TINBERS: Maybe he was clearly wrong. Why don't you admit that?

MR. BERNSTEIN: FEI was clearly erroneous --

JUDGE WINTER: Is it your point that the jury could not have reached the verdict it did without deciding those claims?

MR. BERNSTEIN: Correct.

JUDGE WINTER: There was no evidence to support that verdict other than the claims that Mr. O'Callaghan is now pursuing?

MR. BERNSTEIN: That's correct, your Honor. The reason for that is that it was agreed we thought that the agreed upon contract price, it's undisputed, I should say, was $14 million. It was undisputed that we paid $7.8 million to FEI and we paid an additional $6.5 million to other suppliers to complete the contract.

When the jury found that FEI had defaulted and that O&Y did not cause the default but only awarded $6OO,OOO in damages, we moved to judgment NOV on the ground that there was no disputed issue of fact that O&Y had, in fact, paid FEI at least $7.8 million.

Maybe there are issues as to whether the additional amounts paid to third parties was fair and reasonable, but at least as to the amount paid to FEI, that was clear and undisputed. Excuse me, But the dilemma facing the judge was how can he harmonize this jury verdict. We felt he should not have accepted the jury verdict, but we didn't win. He harmonized it by finding that the jury must have considered the amounts in Exhibit 317. He also looked at testimony that FEI's chairman had made.

JUDGE WINTER: You moved for judgment NOV?

MR. BERNSTEIN: Yes.

JUDGE WINTER: Did you submit papers?

MR. BERNSTEIN: Absolutely.

JUDGE WINTER: And Mr. O'Callaghan submitted papers?

MR. BERNSTEIN: He certainly did.

JUDGE WINTER: Did Mr. O'Callaghan in those papers say that the judgment was valid because it could be rationalized because of overhead, retention and taxes?

MR. BERNSTEIN: Mr. O'Callaghan's position was that the jury verdict was proper and he did not assert, at that time, any claim for overhead, taxes and retention. What he did do --

JUDGE WINTER: I didn't ask that. I asked you whether he justified the verdict and opposed judgment NOV by saying that it probably included overhead, taxes and retention.

MR. BERNSTEIN: No, he did not. He did not assert that position in his paper.

JUDGE WINTER: Why should we assume the district judge took that position?

MR. BERNSTEIN: The district judge here took the position -- I think the district judge took an either/or position. Basically said I can't tell whether it was included. It certainly wasn't taken out. Because there was nothing expressed on the record that took it out and the fact is that the amount that O&Y
agreed to pay was an issue.

JUDGE WINTER: There was nothing expressed in the record that took it out. What do you mean by that?

MR. BERNSTEIN: The judge asked Mr. O'Callaghan repeatedly, "Show me in the record, show me in the transcript, show me where it is that I said that your claim for taxes, retention and overhead was taken out from consideration by the jury."

And all Mr. O'Callaghan said was, "You severed my third-party claims." Well, it's true.

JUDGE WINTER: That's what he's saying here?

MR. BERNSTEIN: That's right.

JUDGE McLAUGHLIN: Isn't that enough to take it out?

MR. BERNSTEIN: The judge felt that in light of the fact that there was evidence submitted on those claims to the jury that those claims are reflected in the third-party complaint and the total amount asked for in the third-party complaint was $21 million of which 19 had already been paid. And the judge felt that the only way to rationalize the jury verdict was to conclude that the agreed upon contract price was $22 million, which was more than FEI was claiming.

JUDGE WINTER: The judgment shouldn't have been granted?

MR. BERNSTEIN: It sure shouldn't have, but we did not appeal.

JUDGE WINTER: Why?

MR. BERNSTEIN: Why didn't we appeal?

JUDGE WINTER: Why couldn't you appeal? When they appealed, why couldn't you have cross-appealed?

MR. BERNSTEIN: We could have. What we have said was that if in our papers, what we said was that if the court were to find, if this court were to find that FEI's claims were severed, then it also follows that the court was wrong on its NOV motion upon which this was predicated.

And that if there is a claim of FEI's that was not heard before the jury, then NOV should be granted and we will try FEI's claims for whatever overage, for whatever amounts it claims as an offset.

JUDGE TIMBERS: The problem is you're faced with a record that shows the judge made a finding that those two items, the tax thing and what's the other one, overhead?

MR. BERNSTEIN: Taxes, overhead and retention.

JUDGE TIMBERS: Were considered by the jury and were incorporated in its verdict.

MR. BERNSTEIN: That's right.

JUDGE TIMBERS: Unless he was clearly wrong, he's still bound by that.

MR. BERNSTEIN: You find, I don't think he was clearly erroneous. There is evidence in the record to support what he's saying. For one thing, Mr. O'Callaghan argued to the jury about the retention claim. And I quote his argument about the retention claim to the jury in my brief.

The other thing in that the taxes and overhead claim --

JUDGE WINTER: What page do you quote that, page 16?

MR. BERNSTEIN: Yes. Page 16, the 700,000 is to be repaid to FBI, retention money repaid to FEI.

So what I submit, your Honor, let me try to suggest what happened here. What happened here is that the court concluded that FEI did extraordinarily well. It was facing claims of $13.5 million by O&Y, it ended up with a jury verdict of 600,000 against it. $7.8 million over and above the contract price was undisputed was paid to FEI, so it was undisputed that they got $22 million.

JUDGE WINTER: I understand all that. But if I understand the procedural posture of this case, we are not allowed to reduce any verdict against you. That's just not before us.

MR. BERNSTEIN: Well, your Honor, I would suspect that if -- I see that my time is up. But if I may answer your question --

JUDGE WINTER: Go ahead.

JUDGE TIMBERS: You saved some rebuttal time. You can use it now.

MR. BERNSTEIN: Did I have some rebuttal time? I didn't think so.

JUDGE WINTER: No.

JUDGE TIMBERS: Excuse me, I had the wrong slip.

MR. BERNSTEIN: What we had argued was if the court finds that FEI's claims were reduced, were severed and not heard by the jury, then the court should reduce, should grant the NOV motion or deem that or that finding upon which FEI's claims are predicated has to also go back to the District Court for instructions to deal with this matter as if FEI's claims had been severed, and we're faced with a payment of $7.8 million.

Otherwise, what we're faced with here is a situation where --

JUDGE WINTER: I think you couldn't have appealed from denial of judgment of the NOV.

MR. BERNSTEIN: There's been no order entered.

JUDGE WINTER: There was no order entered. There was no final judgment at that time?

MR. BERNSTEIN: That's right, there was no final judgment entered.

JUDGE WINTER: At any time?

MR. BERNSTEIN: No final judgment has been entered.

JUDGE TIMBERS: An 54(B) judgment.

MR. BERNSTEIN: The 54(B) judgment entered by the bonding company on behalf of the bonding company.

JUDGE TIMBERS: The court made a finding there was no reason to delay the entry.

MR. BERNSTEIN: Judgment with respect to the bonding

company. What the court did was it said that since the jury must have concluded that it was a $22 million contract and not a $14 million contract.

JUDGE WINTER: That's understood. No final judgment entered between you and FEI?

MR. BERNSTEIN: That's correct. Only a 54(B) only with respect to the dismissal of A and C claims.

JUDGE WINTER: He's appealing only from a finding of fact?

MR. BERNSTEIN: He's appealing from the court's dismissal of his claims with respect to buildings A and C.

And what the court did was grant 54(B) on the dismissal of his claims, third-party claims with respect to buildings A and C.

But what the court also did was deal with his claims for B and D by entering a conditional order of dismissal which was not a ruling on the merits and was not intended to be part of a final judgment.

JUDGE WINTER: What about your $600,000?

MR. BERNSTEIN: It's never been reduced to judgment. We've never collected it and if we were to collect it, we would also have a claim which the judge --

JUDGE WINTER: Why aren't you arguing that he can't appeal?

JUDGE TIMBERS: The judge explained.

MR. BERNSTEIN: The judge expressly gave --

JUDGE TIMBERS: Excuse me for a moment, I have trouble being heard. The judge found -- made a finding in that 54(B) judgment he dismissed the $600,000 claims out of the case.

MR. BERNSTEIN: No, your Honor. What I think he did --

JUDGE TIMBERS: You didn't take an appeal?

MR. BERNSTEIN: What he had done was he entered a conditional dismissal, which was not part of the 54(B), a conditional dismissal of those claims that O&Y has and the reason for that is this: O&Y has claims that have $600,000 from the jury verdict, another $400,000 on an unrepaid loan, which was also severed from the case. So O&Y had claims of a million dollars.

FEI's remaining claims on buildings B and D amounted to approximately $700,000. The judge found conditionally was, "If my ruling affirming the dismissal of the claims on A and C is affirmed, then it is not in the interests of justice and a waste of time."

JUDGE TIMBERS: Put it just the other way around, subject to reinstatement.

MR. BERNSTEIN: Yes.

JUDGE TIMBERS: "If the foregoing judgment is reversed or the claims to which it pertains are remanded as a result of any appeal." That sounds to me like a very conscientious district judge that anticipated the case in some time might have to come back to him.

MR. BERNSTEIN: If it comes back, what he's saying is that O&Y should have every right to raise the offsets that it would have with respect to the 600,000 verdict alone.

JUDGE WINTER: At what point can you appeal the judgment of NOV or could you have appealed it?

MR. BERNSTEIN: We can appeal it whenever a final judgment is entered. We could have asked the judge to enter --

JUDGE WINTER: Isn't the judge's -- I'm now totally confused. Isn't the certification under Rule 54 error because these are not severable claims? You're arguing that that [sic] the judgment, that if we reversed his claims, then when you appeal the judgment NOV, that's got to be reversed.

MR. BERNSTEIN: Well, I didn't brief the issue on whether 54(B) was properly entered.

JUDGE WINTER: Did you agree to it?

MR. BERNSTEIN: Yes. We agreed to it because the judge wanted to -- we had pending before the judge --

JUDGE WINTER: See, you're saying that the third-party claims were dismissed at the time the judge denied the motion for judgment NOV.

MR. BERNSTEIN: We are saying --

JUDGE WINTER: Either that or they were satisfied.

MR. BERNSTEIN: Yes, we're saying they were satisfied at the time the judge denied the motion for NOV, but it wasn't before him. What happened was --

JUDGE WINTER: What wasn't before him?

MR. BERNSTEIN: Let me state it chronologically. The motion for NOV was decided in September of '88.

JUDGE WINTER: And the judge decides in September of '88 that all of the third-party claims --

MR. BERNSTEIN: No. What happened was --

JUDGE WINTER: Maybe I should finish.

MR. BERNSTEIN: Okay.

JUDGE WINTER: The judge decided that the third-party claims were included in the verdict?

MR. BERNSTEIN: He did do that, but he didn't do that in September of '88.

JUDGE WINTER: He did it later.

MR. BERNSTEIN: He did it later. What happens --

JUDGE WINTER: Implicitly, he did it in September.

MR. BERNSTEIN: Arguably, but it wasn't before him. What happened was we made our motion for NOV.

JUDGE WINTER: Why wasn't that before him? Why is it before us and not before him?

MR. BERNSTEIN: Because, if I could just state it chronologically, I think it might clear it up.

JUDGE TIMBERS: Before you do that, may I ask you, since the presiding judge, there's a judge on this court, one of our colleagues, predecessors, he used to say when that red light goes on, out goes the money. Don't you believe in that?

JUDGE WINTER: Unless the presiding judge has questions.

MR. BERNSTEIN: Judge Timbers, with that in mind, let me just say, if the panel has no further questions --

JUDGE WINTER: I do not understand what's going on here.

JUDGE McLAUGHLIN: I don't either.

JUDGE WINTER: Two of us don't understand this. Now without your going into the chronology, let me try and state the confusion.

MR. BERNSTEIN: Sure.

JUDGE WINTER: The burden of your argument, as I understand it, is that the partnership claims, although severed, were, in fact, the basis for the jury verdict.

MR. BERNSTEIN: In fact, with respect to buildings A and C,

correct.

JUDGE McLAUGHLIN: The evidence went in. It was charged to the jury, it was summed up and everything, even though there was a severance.

JUDGE WINTER: It was not charged to the jury?

MR. BERNSTEIN: No, I don't -- with respect to the jury charge, the jury was asked to, in question No. 3 of the special verdict form, the jury was asked to find what was the adjusted contract price and what damages, if any, did O&Y incur over and above the adjusted contract price. And implicit in that question No. 3 has to be a finding by the jury what was the adjusted contract price.

Now we argue that the adjusted contract price was $14 million, but the judge said in order to rationalize this jury verdict, I have to find that the jury concluded it was $22 million. Since that exceeds the amount of whatever FEI was claiming in its third-party complaint, that should be the end of the matter. But it wasn't.

What happened after September of '88 is that the judge said, "Okay, now that I've decided judgment NOV against O&Y, let's turn to these third-party claims of FEI. Mr. O'Callaghan, do you have any third-party claims left? Weren't they all taken care of by the jury verdict?"

The answer was, "Well, yes, but I disagree with your finding that the agreed upon contract price was $22 million. It was really $14 million. So the predicate for my third-party complaint, third-party claims is that the agreed upon contract price was $14 million."

So Judge Griese says, "Well, then, you can't recover, you can't get it twice. The jury effectively gave you $7.8 million, which is more than you are even asking for. So you can't get it twice."

At that point, two months later, Mr. O'Callaghan submitted, that's why he was asked for chapter and verse. Two months later, he said, "Well, my claims were really for $2 million more than the $22 million that the jury found." And the judge said, "Where's that? I don't see that anywhere."

We moved for summary judgment to dismiss those claims.

The matter was briefed. The court never decided. He issued a ruling a year ago in December last year in which he finally ruled on the A and C claims, but the matter was before him since 1988. That's what happened.

JUDGE WINTER: Okay.

MR. BERNSTEIN: Okay.

JUDGE McLAUGHLIN: This is a procedural jungle.

MR. O'CALLAGHAN: I have five minutes, Judge.

JUDGE TIMBERS: It's a morass, a morass.

MR. O'CALLAGHAN: If I may simplify it, to some extent, I addressed in my reply memorandum a final judgment here. O&Y didn't appeal anything. Years ago, I made a motion to dismiss. They didn't appeal that. I'm not certain it's 54. They didn't appeal that. They didn't appeal in this case. The issue now is finally before this court. I have addressed it on my first point in my reply papers.

JUDGE TIMBERS: The issue is what is set forth in the Rule 54. That's what he allowed in interrogatory [sic] appeal. Otherwise --

MR. O'CALLAGHAN: The judge stated, the Rule 54 order was drafted and submitted by Olympia a York. Olympia a York drafted it and submitted it to the court. And the judge signed it and he said in the order, "It is further ordered" -- "further ordered that all remaining claims on the defendants are hereby dismissed with prejudice."

That is my entire case. That's what I appealed upon his final judgment in this case. Olympia & York's judgment against INA was years ago. Olympia & York had a jury verdict and Olympia & York has not appealed anything.

JUDGE WINTER: The judgment has never been entered.

JUDGE TIMBERS: Other than the 54(B).

MR. O'CALLAGHAN: There was a judgment entered in the INA, in INA's dismissal. The judgment upon the jury verdict. I'm not certain that there was an order entered. There were two opinions issued concerning the jury verdict, sustaining the jury's verdict.

JUDGE WINTER: Opinions are nothing, it's judgments that count. Not nothing --

JUDGE TIMBERS: Is there a judgment other than 54(B) that's headed "54(B) Judgment and Order of Conditional Dismissal"? Is there any other judgment?

MR. O'CALLAGHAN: The only other judgment I'm aware of, your Honor, is the INA judgment. That's the only other judgment I recall.

JUDGE WINTER: What was that for?

MR. O'CALLAGHAN: That was a dismissal of INA from the case.

JUDGE WINTER: So there is a final judgment?

MR. O'CALLAGHAN: I submit there's a final judgment concerning my case, your Honor, and Olympia a York did not appeal.

JUDGE WINTER: Concerning your third-party claim?

MR. O'CALLAGHAN: Olympia & York didn't appeal. They didn't appeal.

JUDGE WINTER: According to both of you, there's nothing for them to appeal. That's why I raised the question whether this is properly before us under Rule 54. There's nothing severable about it at all. It's all one issue.

MR. O'CALLAGHAN: I submit it is properly before you, your Honor. It's only my case that now exists in this situation.

JUDGE TIMBERS: We're not necessarily -- Judge Winter is entirely correct. We're not bound by Rule 54(B) certificate. We can find it was improvidently granted and there are cases in this court that have so held.

JUDGE WINTER: Did the judge find that the jury verdict included the claims you are now asserting?

MR. O'CALLAGHAN: Yes, your Honor. That's what he said the summer of 1990 --

JUDGE WINTER: Is it your claim in the case that your claims are really not at this point in the litigation severable from any appeal from the jury verdict?

MR. O'CALLAGHAN: I don't know how to answer that question. I can only say the judge severed my claims at the trial. His conclusion that the verdict must have encompassed it, I say, is clear error. I can't answer your question any other way.

JUDGE WINTER: It may be error, but shouldn't we await the hearing of your opinion until we get the appeal from the denial of motion for judgment NOV?

MR. O'CALLAGHAN: I would like to address that if I may,, your Honor, in my own memorandum submitted after this. I don't agree I can address that this morning because I'm not prepared to address it. He hasn't raised any appeal issue at all.

JUDGE WINTER: We have to, subject matter jurisdiction, we have to raise it. I think it would be helpful if both of you would address all of these issues as to appealability in a letter to be delivered to the Clerk's office no later than a week from today.

JUDGE TIMBERS: New Year's Eve.

JUDGE WINTER: A week from tomorrow is New Year's Eve.

JUDGE TIMBERS: Christmas Eve.

MR. O'CALLAGHAN: Might I just ask for a few days later. I have some other matters to attend to.

JUDGE WINTER: January 4th.

MR. O'CALLAGHAN: 317 is not a submission of FEI's claims. It's a recap of payments in an industry between a contractor and subcontractor. Some recaps, this doesn't include the overhead. It doesn't include the taxes. It wasn't intended to do that.

On the issue of 317 and 318 being before the jury, you're correct, they were irrelevant. In fact, Olympia & York objected strenuously before the jury came in with a verdict that the jury had 317 and 318. And I address it in my memorandum, pages 15 and 16.

Counsel for Kaye, Scholer vehemently objected to the jury having that, saying and the reason why they objected was because it has a damage figure on it, because a damage figure on it for which there was never any testimony, never any connection. The witness never got back to it and it's an amount on which there was nothing in the summation, no reference to it, no cross-examination.

And the reason all that is true, of course, your Honor, is because it had been severed. Olympia & York was concerned that the jury would actually consider my claims and they were very adamantly trying to tell Judge Griese the jury doesn't have that claim, it's been severed. And the judge said exactly that's true [sic]. On the point of the retention being argued to the jury.

There was summation of the facts that I made to the jury starting back in 1982 in the World Financial Center, I covered every fact I could have possibly covered. There was no argument to the jury to give me any retention because it had been severed.

JUDGE WINTER: You understand about these letters. If he has a judgment he could appeal from, he, Mr. O'Callaghan, should let us know about that. We want detail of all of the judgments that have been entered, what is appealable and whether the Rule 54 certification was improvidently granted.

MR. O'CALLAGHAN: Yes, your Honor.

JUDGE TIMBERS: I assume we're entitled to post-summation briefs simultaneously?

JUDGE WINTER: They should go to the Clerk's office January 4th.

Thank you both.

APPENDIX T - LETTER OF COUNSEL FOR FEI, LTD. ET AL. TO CLERK OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED JANUARY 4, 1994

DANIEL J. O'CALLAGHAN
ATTORNEY AT LAW
17 BATTERY PLACE
NEW YORK, N.Y. 10004
212-222-4200

TELECOPIER: 212-222-4205

January 4, 1994

Elaine B. Goldsmith, Esq.
Clerk of the Court
Court of Appeals for the Second Circuit
40 Foley Square
Room 1702
New York, NY 10007

Re: O&Y v. INA v. FEI Ltd, et al.
C.A. No. 93-7547

Dear Ms. Goldsmith,

This letter is submitted at the request of the Court pursuant to instruction at the December 20, 1993, oral argument.

There have been two (2) judgments entered in the action:

(i) Final Judgment as to Defendant Insurance Company of North America ("**INA**"), dated September 24, 1991 (the "**INA Judgment**"), (A 321-22); and

(ii) Rule 54(b) Judgment and Order of Conditional

Dismissal, dated May 4, 1993 (the "**Rule 54(b) Judgment**"). (A 415-16).

Respectfully., it is apparent from the Record that the INA Judgment was rendered in consequence of the Court's two (2) Opinions (those dated September 18, 1988 (A 176-92) and June 2, 1989 (A 311-20), *both* of which denied O&Y's June 17, 1988, motion for JNOV, including re-argument of the JNOV motion (A 176, 312). The INA Judgment dismissed O&Y's complaint against INA grounded upon "material alteration" of the INA bond (A 319a). Nonetheless, the dismissal incorporated and was grounded upon the identical operative facts - as stated - in the two Opinions (A 319-20) which repeatedly denied O&Y's JNOV motion. Since September, 1991, O&Y has not sought any appeal of this judgment, pursuant to Rule 54(b) or otherwise, notwithstanding the Court's inclusion in the INA Judgment of the direction:

> "further ordering that there is *no just reason for delay in the entry* of such *final judgment* ...
> (A 322). (Emphasis added).

Similarly, in the Rule 54(b) Judgment - a document drafted and submitted by O&Y - the Court determined that:

> (i) certain FEI claims (overhead, $900K and tax reimbursement $IM) are *final, severable, and appealable*;
>
> (ii) *any* further litigation of *all* remaining claims is *futile*;
>
> (iii) O&Y's claims, upon the verdict ($600K) and upon a loan ($450K), with O&Y's consent were *dismissed* with prejudice;
>
> (iv) *all* other FEI remaining claims were *dismissed* with prejudice.

Again, O&Y did *not* seek any appeal from the second

judgment. Definitively, both in the Rule 54(b) Judgment and in the Court's April 3, 1993, conference direction, the Court clearly declared his intent to conclude the litigation of the *set-off claims* extant between FEI and O&Y:

> It is, in my view, a gross waste of everybody's effort to continue litigating ... As far as the district court proceeding is concerned, it should be over with now, regardless of whether FEI consents or not. There is no utility in having a trial or a legal argument or anything further in the District court... (SA 169-70).
>
> [O]&Y has this claim, FEI has their claims, the only possible effect would be to have a judgment in favor of O&Y... and the Court is ordering dismissal of [O&Y's claims] and, necessarily, a dismissal of FEI's *setoffs*, whatever they are." (SA 171) (Emphasis added).

Respectfully, this appeal upon the Rule 54(b) Judgment is appropriately before this Court upon sufficient jurisdiction. Recently, in *Ginett v. Computer Task Group, Inc.*, 962 F.2d 1085, 1095 (2d Cir. 1992), this Court directed that:

> The proper guiding star, as the Supreme Court has emphasized, is "the interest of sound judicial administration [citations omitted]". ... [s]ound judicial administration must involve a proper regard for the duties of both the district court and the appellate court. We should avoid the possibility that the ultimate dispositions of the claims remaining in the district court could either moot our decision on the appealed claim or require us to decide issues twice.

The Court observed that the liberal rules of joinder as well as complex issues and protracted litigation "cry out for flexibility in granting partial final judgments under Rule 54(b)", *Ginett*, at 1095. Indisputably, not just *one* claim but *all* of FEI's claims,

were "finally decided" and there has been an express determination of "no just reason for delay". *Ginett*, at 1091. More, the Court noted that there is *not* any possibility for a mooting of this appeal or concern for decision upon issues twice:

> "If the matter was re-opened, it would only be re-opened as to things that the Court of Appeals remanded and *things that we never have tried* in the district court. So it is not a rehash."
> (SA 172) (Emphasis added).

Definitively, as observed by the Court, the FEI claims presented upon this appeal, are "extricable from one another"; accordingly, the court's discretionary judgment is to be given

> "substantial deference for that court is the one most likely to be familiar with the case and with any justifiable reasons for delay." *Id.* (quoting *Sears, Roebuck*, 351 U.S. at 437, 76 S.Ct. at 900)."

Respectfully, in this 1985, numerous claim, complex action involving a four (4) building dispute concerning construction of the World Financial Center, a dispute in which FEI's claims, indisputably were severed at a March, 1988, trial, indisputably were scheduled for an August, 1992, trial, indisputably were subject to a canceled trial, without notice, then were dismissed six (6) months later, resulting in this appeal into 1994, there is every reason to hear the appeal and enter an order reversing and remanding for a prompt trial of FEI's claims.

Respectfully,

S/Daniel J. O'Callaghan

DJOC: wr
cc : Robert B. Bernstein, Esq. (by mail)

APPENDIX U - LETTER FROM COUNSEL FOR O&Y TO CLERK OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED JANUARY 4, 1994

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
425 PARK AVENUE
NEW YORK, N.Y. 10022-3598
(212) 836-8000
* * *
[Addresses, etc. for other offices omitted]

BY HAND

Clerk of the Court
United States Court of Appeals
For the Second Circuit
40 Foley Square
New York, New York

Re: Olympia & York Battery Park Co., et al. v. Insurance Company of North America, Philadelphia v. FEI, Ltd., et al., No. 93-7547

Dear Sir:

We represent plaintiffs-appellees Olympia & York Battery Park Company, O&Y (U.S.) Development Corp., Olympia & York Tower B Company, and Olympia & York Tower D Company (collectively, "O&Y") in this matter. At oral argument in this appeal on December 23, 1993, Judge Winter directed the parties to supply the Clerk of the Court with a letter addressing whether the district court's entry of judgment pursuant to Federal Rule of Civil Procedure 54(b) was providently granted. We were also directed to attach copies of all judgments that had been entered in the case.

As shown below, the Rule 54(b) judgment entered May 5,

1993 dismissing FEI's Building A and C claims was providently granted because it fully and finally disposed of distinct and separable claims, *i.e.*, *all* claims of O&Y and FEI with respect to Buildings A and C at the World Financial Center, and that judgment presents no likelihood of duplicative appeals.

A total of two judgments have been entered in this case, both pursuant to Rule 54(b). The first, entered October 1, 1991, dismissed all of O&Y's claims against the Insurance Company of North America. That judgment is attached as Exhibit A. No appeal was taken. The second, entered May 5, 1993, and the subject of this appeal, dismissed all claims of FEI and O&Y with respect to Buildings A and C at the World Financial Center. That judgment is attached as Exhibit B.

FEI's claims with respect to Buildings A and C were set forth in FEI's Third Party Complaint; O&Y's corresponding claims against FEI were set forth in counterclaims pleaded in O&Y's Answer to FEI's Third Party Complaint, dated July 31, 1986, pp. 11-16. This pleading is attached as Exhibit C.

The district court's May 5, 1993 judgment not only dismissed FEI's third-party claims against O&Y with respect to Buildings A and C, but it also dismissed O&Y's third-party claims against FEI with respect to these same two buildings, including the $600,000 jury verdict in O&Y's favor. It therefore follows that, no matter how meritorious its appeal might have been, O&Y did not appeal from the district court's denial of O&Y's motion for judgment notwithstanding the verdict in September, 1988, and any such appeal from that ruling would now be time-barred.

One reason for confusion at oral argument on this issue is that we erred when we said that one reason O&Y did not appeal from the j.n.o.v. ruling was that no final judgment had been entered. In fact, final judgment under Rule 54(b) had been entered for purposes of that appeal not once, but twice.

A second reason for confusion is that the district court's order makes O&Y's claims against FEI, including the $600,000 jury verdict, expressly subject to reinstatement if the dismissal of

FEI's claims with respect to Buildings A and C is reversed by this Court. Thus, it is theoretically possible that, if the dismissal of FEI's A and C claims is reversed, and O&Y's A and C claims are reinstated, and final judgment is subsequently entered on these claims, O&Y could conceivably have another opportunity to appeal from the denial of the j.n.o.v. motion.

However, this Court has already held that the "contingent possibility" of such an appeal should not "operate as a mechanical bar forbidding entry of a 54(b) judgment." *See State of New York v. Amro Realty Corp.*, 936 F.2d 1420, 1424-25 (2d Cir. 1991). Thus, the possibility that O&Y's A and C claims could be reinstated should not ipso facto make the issuance of the Rule 54(b) judgment improper.

In *Amro*, the district court entered a Rule 54(b) judgment which "completely and finally disposed" of third party claims brought against four insurance companies by defendants in a CERCLA action. 936 F.2d at 1424. One of the insurers argued that the judgment was improvidently granted because the same claims against the insurers would inevitably be brought in a second CERCLA action which had been consolidated with the first. Thus, the insurer argued that the same dispute "will necessarily be back again to this court after the district court has made a ruling in the consolidated case.... *Id.* at 1425. However, the court of appeals held that the Rule 54(b) judgment was providently granted and concluded that the district court was "within its discretion in concluding that the benefits of an immediate appeal outweighed the loss of judicial efficiency which might ensue if this appeal were to be followed by another one involving the same parties...." Furthermore, *Amro* pointed out that, as noted by the Supreme Court,

> "[E]ven where 'the district court conclude[s] that there [is] a possibility that an appellate court would have to face the same issue on a subsequent appeal, this might perhaps be offset by a finding that an appellate resolution of the certified claims would facilitate a settlement of the remainder of the claims.'"

Id. at 1426, citing *Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 8 and n.2 (1980). Here, the district court made clear that a Rule 54(b) judgment would "facilitate a settlement of the remainder of the claims," *i.e.*, those with respect to Buildings B and D. Thus, the order provides that, if its dismissal of FEI's claims with respect to Buildings A and C is affirmed, then the entire litigation would be at an end because, in order to settle the matter, O&Y has given up its remaining claims against FEI, which exceed the total dollar amount of FEI's claims with respect to Buildings B and D, and, under those circumstances, any trial of FEI's B and D claims would be a waste of judicial resources.

It is also clear that the A and C claims are distinct and separable from the parties' respective B and D claims. Claims are normally regarded as "separable" if they "involve at least some different questions of fact and law and could be separately enforced." *Cullen v. Margiotta*, 811 F.2d 698, 711 (2d Cir.), *cert. denied*, 483 U.S. 1021 (1987); *see also Gottesman v. General Motors Corp.*, 401 F.2d 510, 512 (2d Cir. 1968) (finding separable claims where "different sets of operative facts will determine the result"). Here, the parties' respective claims with respect to Buildings B and D do involve different sets of operative facts, exhibits and proof. Thus, the B and D claims involve different work, different contracts, different buildings and different theories of recovery. The A and C claims are based on FEI's alleged financial default and resulting failure to perform for the agreed upon contract price. The B and D claims are based on FEI's claims for damages following O&Y's termination of contracts it had with FEI for work on those two buildings.

In short, the district court properly certified the May 5, 1993 judgment as final pursuant to Fed. R. Civ. P. 54(b), and this Court can thus decide whether, even though FEI's Third Party Claims were severed at the trial, the district court properly dismissed FEI's third party claims with respect to Buildings A and C.

As shown in our brief and at oral argument, the record at trial shows that FEI did present its claims to the jury with respect to Buildings A and C. Thus, FEI submitted to the jury a

tabulation of its entire claim with respect to Buildings A an C, which was marked into evidence as Exhibit 317 and which was also Exhibit 1 to FEI's Third Party Complaint.[27] The record shows that FEI *did* argue these claims to the jury. Thus, for example, in his closing to the jury, FEI's counsel expressly referred to the $700,000 claim for retention which FEI now claims was severed. Furthermore, based on the September, 1988 j.n.o.v. ruling, the jury had to have both considered and found for FEI on all of its Third Party Claims with respect to Buildings A and C because the jury found that O&Y agreed to pay FEI a total of $22 million, which exceeds the $21 million figure set forth in Exhibit 317 as the sum total of its A and C claims.

In sum, there is ample evidence to show that, with respect to Buildings A and C, FEI's Third Party Claims *were* tried to the jury, even though these claims had been nominally severed from the trial.

Respectfully submitted,

S/Robert B. Bernstein
Robert B. Bernstein

cc: Daniel J. O'Callaghan, Esq.,
Counsel for Defendants-Appellants

---

[27]As FEI's counsel pointed out at oral argument, Exhibit 317 went to the jury over O&Y's strong objection. The only conceivable basis we can think of for admitting Exhibit 317 into evidence is on the issue of what O&Y agreed to pay FEI, which is what the district court determined the jury was asked to decide. *See* December 23, 1992 hearing transcript at A 333. However, if, as FEI contends, the issue of what O&Y agreed to pay FEI was *not* before the jury, then the admission of Exhibit 317 into evidence was clearly erroneous, and highly prejudicial.

APPENDIX V - MOTION BEFORE THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT TO EXPEDITE DECISION DATED SEPTEMBER 14, 1994

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

OLYMPIA & YORK

-v-

INSURANCE CO OF
NA

93-7547

NOTICE OF MOTION ...
TO EXPEDITE DECISION

MOTION BY: OPPOSING COUNSEL:

Daniel J. O'Callaghan, Esq.... Robert B. Bernstein, Esq....

* * *

Has argument date of appeal been set: ...
Argument heard 12/22/93

* * *

Brief statement of the relief requested:

An order and/or decision upon the appeal, together with full and complete protection of FEI's ability to obtain collection in full notwithstanding O&Y bankruptcy.

* * *

By:

S/ Daniel J. O'Callaghan 9/14/94

---------- **ORDER** ----------

IT IS HEREBY ORDERED that
the motion be and it hereby is granted denied

_____

RECEIVED

94 SEP 15 AM11:29
U.S. COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

OLYMPIA & YORK BATTERY PARK COMPANY and O & Y TOWER C CORP.,
Plaintiffs-Appellees,

-against-

INSURANCE COMPANY OF NORTH AMERICA PHILADELPHIA,
Defendant,

-against-

FEI LTD., JOHN J. FOGARTY and JEAN FOGARTY,
Third-Party Defendants-Appellants.

C.A. No. 93-7547

AFFIRMATION IN SUPPORT OF FEI'S MOTION TO EXPEDITE DECISION

I, DANIEL J. O'CALLAGHAN, attorney on behalf of Third-Party Defendants-Appellants, FEI, Ltd., John J. Fogarty and Jean Fogarty (collectively, "**FEI**"), do affirm under penalty of perjury that:

1. I submit this affirmation in support of FEI's Motion to Expedite Decision. Oral argument of this appeal was heard on December 22, 1993. Thereafter, pursuant to the Court's request, on January 4, 1994, supplemental letters from counsel for the parties were filed with the Court. However, through today, a decision has not been rendered upon this appeal.

2. This appeal concerns a March-April, *1988*, severance by the District Court of FEI's approximately $5 million in claims against Olympia & York ("**O&Y**") relating to a construction

dispute concerning the World Financial Center project. On February 11, 1992, the District Court directed a two-week August, 1992, trial of FEI's claims. FEI prepared for trial and appeared at the scheduled date and time but was advised by the District Court that a trial had not been scheduled. On December 23, 1992, the District Court directed a dismissal of FEI's claims. By judgment and order entered May 5, 1993, the District Court disposed of all claims with respect to all parties. An appeal to the United States Court of Appeals for the Second Circuit was filed on June 1, 1993.

3. At the December 22, 1993, oral argument, FEI requested a prompt disposition of the appeal, particularly in context of well-known financial difficulties of O&Y worldwide, including significant bankruptcy proceedings in Canada and the United Kingdom. In consequence of the absence of decision through June, 1994, FEI wrote to this Court by letter dated June 24, 1994, requesting advices concerning the status of the appeal. FEI did not receive any response to this correspondence. (Copy of FEI June 24, 1994, letter annexed as "**Ex A**").

4. Today, your affirmant reviewed a copy of the September 12-18, 1994, *Crain's New York Business*, Vol. X, No. 37 ("***Crain's***"), which reports in a front page headline: "Bankruptcy feared at O&Y; Canada, U.S. creditor showdown may mean Ch. 11". Thereafter, *Crain's* reports that proceedings are scheduled to be heard by Federal Bankruptcy Judge James L. Garrity, Jr. on Friday, September 16, 1994, relating to the potential bankruptcy of O&Y in the United States (New York). (Copy of referenced *Crain's* front-page report annexed as "**Ex B**").

5. In consequence of the continuing prejudice sustained by FEI since the 1988 severance, the non-occurrence of the scheduled August, 1992, trial, and the delay in disposition of this appeal, FEI requests that the Court grant the following relief: (i) expedite issuance of a decision upon this appeal and (ii) provide in such decision, or otherwise, for the full and complete protection of FEI's ability to obtain collection in full upon any judgment obtained against O&Y upon any or all of FEI's claims, notwithstanding any bankruptcy proceeding which may be commenced concerning O&Y in the United States.

6. Accordingly, FEI requests that this motion to expedite decision, together with all other relief requested herein, be granted, and that the Court grant such other and further relief as the Court deems just and proper upon this appeal.

Dated: New York, New York
September 14, 1994

S/
Daniel J. O'Callaghan

DANIEL J. O'CALLAGHAN
ATTORNEY AT LAW
17 BATTERY PLACE
NEW YORK, N.Y. 10004

212-222-4200

TELECOPIER: 212-222-4205

June 24, 1994

BY HAND
Clerk of the Court
Court of Appeals for the Second Circuit
40 Foley Square
New York, NY 10007

Re: O&Y v. INA v. FEI Ltd., et al.
C.A. No. 93-7547

Dear Clerk,

As counsel for Appellants FEI, Ltd., John J. Fogarty and Jean Fogarty, I write to the Court concerning this matter. This appeal addresses the District Court's 1988 severance for subsequent trial of Appellants' claims. Oral argument upon the appeal was heard on December 22, 1993. It is well known and quite understandable that the Court has a full schedule and addresses many matters of great importance. Is there any information that I may provide to Appellants concerning the status of this appeal? Is there any further assistance that Appellants may provide to the Court?

Respectfully,

Daniel J. O'Callaghan

DJOC: wr
cc: FEI, Ltd.
Robert B. Bernstein, Esq.
Counsel for Plaintiffs-Appellees

Exhibit A

CRAIN'S NEW YORK BUSINESS
SEPTEMBER 12-18, 1994
* * *
VOL. X, NO. 37

Bankruptcy feared at O&Y

Canada, U.S. creditor showdown may mean Ch. 11
BY PETER GRANT
CRAIN'S NEW YORK BUSINESS
* * *

The struggle over Olympia & York's U.S. subsidiary heads for a showdown this week with the possibility of bankruptcy more likely than at any other point in the company's two-year-old restructuring effort.

A court hearing is scheduled Sept. 16 to decide whether the administrator of the company's Canadian parent can fire two members of the U.S. board of directors. If he can't fire them, the creditors of the parent company who control the administrator threaten to force O&Y into bankruptcy. If he can, the creditors of the U.S. company that support the directors may push for bankruptcy.

The makeup of the board is critical because after two years of restructuring secured loans, the nine-member body is beginning to decide how to carve up Olympia & York's equity. That has pitted the so-called Canadian creditors -- who currently control 80% of the equity -- against Citibank and Apollo Real Estate Investments, who own the majority of the unsecured claims against the company.

Both sides continued negotiating last week, well aware that a bankruptcy filing would hurt everyone. But battle lines were hardening. "A confrontation has been forced, " says one individual close to the Canadian creditors. "Now things could melt down very quickly."

A Chapter 11 filing would be disastrous for Olympia & York, the city's largest office building owner. Ever since its Canadian parent was taken over by creditors in 1992, management of the U.S. company has been struggling to maintain O&Y as a viable business. Secured creditors, who until now have gone along with this strategy would likely press for a return of their collateral

in a bankruptcy proceeding.

Exhibit B

That would be a nightmare scenario for the city's real estate industry, which is struggling to emerge from one of the worst downturns of the century. A drawn out bankruptcy proceeding would discourage lenders from returning to the Manhattan market. Continued uncertainty over who will ultimately own such trophy assets as 1290 Sixth Ave, 245 Park Ave. and the World Financial Center would undercut the fledgling recovery in the leasing market....

Arguments on the attempt to oust board members Richard Shinn and Willard Butcher are scheduled to be heard by Federal Bankruptcy Judge James L. Garrity Jr., who has been overseeing the Olympia & York case since its Canadian parent filed for bankruptcy protection in the United States and Canada in 1992. Attorneys expect he will make a decision within a few days.

Until now, creditors of the Canadian company have had the most to lose from a bankruptcy filing. They still are owed a staggering $4 billion by the parent company whose most valuable asset is its U.S. arm. But they only control the equity in the U.S. subsidiary through Coopers & Lybrand, the administrator of the Canadian company. As such, their equity claim ranks behind institutions holding mortgages on U.S. properties and insecure creditors holding more than $750 million in debt.

But during the restructuring, the Canadian creditors and Coopers & Lybrand have been outmaneuvered by Apollo and Citibank, one of the largest U.S. unsecured creditors. By strategically buying blocks of unsecured debt and then joining forces, the investment fund and bank have positioned themselves to argue that they, not the Canadian creditors, are the rightful owners of the company.

Groups could not agree

The two largest Canadian creditors -- Canadian Imperial Bank of Commerce and Hong Kong & Shanghai Banking Corp. -- tried to convince their group to join together to buy unsecured debt. But the institutions could never agree on a strategy, which would have meant investing more money into O&Y....

Chapter 11 may be inevitable

Sources say the Canadian creditors have indicated they will have "no choice" but to force a bankruptcy action if Messrs. Shinn and Butcher remain on the board. They probably could not file a voluntary Chapter 11 petition. But they could launch an involuntary bankruptcy by obtaining the support of three creditors.

Individuals close to the Canadian group believe this will not be a problem....

Legal experts predict that Judge Garrity will rule against the Canadian creditors. They note that Olympia & York's U.S. operation was re-incorporated with a new board of directors last year following a power struggle between the Canadian creditors and Citibank that was arbitrated by former Secretary of State Cyrus R. Vance....

UNITED STATE COURT OF APPEALS
Second Circuit
United States Courthouse
Foley Square
New York 10007

GEORGE LANGE III
Clerk

Date: September 15, 1994

Re: Olympia & York v. Insurance Co of NA

Docket No: 93-7547

We Cannot accept the enclosed motion for filing the following reason(s):

* * *

(X) Other SEE: SUMMARY ORDER filed on 9/15/94 AFFIRMING D.C. decision

Very truly yours,

GEORGE LANGE III, Clerk
By: Angela Martin

S/Angela Martin
Deputy Clerk, USCA

Enclosure(s)

Exhibit C

APPENDIX W - MOTION BEFORE THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT RELATING TO EN BANC REHEARING DATED SEPTEMBER 21, 1994

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

OLYMPIA & YORK

-v-

INSURANCE CO OF
NA

93-7547

NOTICE OF MOTION ...
RELATING TO EN BANC REHEARING

MOTION BY: OPPOSING COUNSEL:

Daniel J. O'Callaghan, Esq.... Robert B. Bernstein, Esq....

* * *

Has argument date of appeal been set: ...

Decision dated 9/15/94

* * *

Brief statement of the relief requested:

(1) An order granting additional time and pages concerning a Petition for rehearing, together with the addition of exhibits and (2) statements relating to the 9/15/94 Summary Order.

* * *

By:

S/ Daniel J. O'Callaghan 9/21/94

---------- ORDER ----------

IT IS HEREBY ORDERED that
the motion be and it hereby is granted denied

_____

RECEIVED

SEP 21 1994
U.S. COURT OF APPEALS
2ND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

OLYMPIA & YORK BATTERY PARK COMPANY and O & Y TOWER C CORP.,
Plaintiffs-Appellees,
-against-
INSURANCE COMPANY OF NORTH AMERICA PHILADELPHIA,
Defendant,
-against-
FEI LTD., JOHN J. FOGARTY and JEAN FOGARTY,
Third-Party Defendants-Appellants.

C.A. No. 93-7547

AFFIRMATION IN SUPPORT OF FEI'S MOTION RELATING TO EN BANC REHEARING

I, DANIEL J. O'CALLAGHAN, attorney on behalf of Third-Party Defendants-Appellants, FEI, Ltd., John J. Fogarty and Jean Fogarty (collectively, "**FEI**"), do affirm under penalty of perjury that:

1. I submit this affirmation in support of FEI's Motion Relating to En Banc Rehearing. On September 15, 1994, at 11:29 a.m., Affirmant filed in the United States Court of Appeals for the Second Circuit a "**Motion to Expedite Decision**", grounded upon the publicly reported imminence of bankruptcy of Appellee, Olympia & York ("**O&Y**"). At the occasion of this filing, Affirmant was not advised of any decision already having been rendered upon this appeal, rather, the Motion to Expedite Decision was accepted for filing. (Copy of Motion to Expedite Decision, dated September 15, 1994, is annexed as "**Exhibit C**").

2. Subsequently, on September 15, 1994, at 3:30 p.m., this Court's Clerk's office telephoned Affirmant's office to advise that a decision upon this appeal had been rendered in a Summary Order affirming the District Court's dismissal of nearly $5 million of FEI

claims (or counterclaims) against O&Y, notwithstanding severance of such claims at a 1988 trial (the "**Summary Order**").

3. On September 19, 1994, Affirmant received by mail from this Court's Clerk's office a copy of the Summary Order filed September 15, 1994, together with return of the Motion to Expedite Decision, grounded upon prior issuance of the Summary Order.

4. In addition to the Summary Order's substantive affirmance, there is notable about the Summary Order at least the following: (i) the stated recusal of Judge William H. Timbers, absent stated grounds or date of recusal, (ii) the absence of signature by Judge Joseph M. McLaughlin, rather, such signature "per RKW",[28] (iii) an affirmance solely grounded upon the District Court December 23, 1992, conference directions, nonetheless, absent any statement which addresses the delay in issuance of such affirmance in context of the oral argument heard December 22, 1993, (the "**Oral Argument**") and (iv) in context of the nearly ten (10)-month period elapsed since the Oral Argument, notwithstanding an appeal upon limited appendices, briefs, and legal issues - indeed, upon one legal issue, a trial-transcript-recorded severance - and (v) in context of the continuing publicly reported imminence of an O&Y bankruptcy. (Copy of Summary Order, dated September 15, 1994, annexed as "**Exhibit D**".)

5. The Oral Argument encompassed forty-five (45) minutes and was transcribed into forty-three (43) pages of text. Respectfully, it is submitted that any fair review of the transcript of this argument reveals the absence of all support upon any grounds for the District Court's dismissal, rather, only indication of some concern for O&Y's failure to cross-appeal and relating to the validity of O&Y's R. 54(b) jurisdictional challenge. Definitively, all R. 54(b) issue was resolved in favor of this Court's jurisdiction upon compliance with the Court's direction for counsels' letters, filed on January 4, 1994, confirming finality of judgments issued. Thereafter, through issuance of the Summary Order on September 15, 1994, FEI continued to sustain prejudice

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[28]Affirmant does not dispute Judge McLaughlin's participation in the Summary Order, but requests a statement relating to the timing of issuance.

upon the delay in resolution of the appeal, manifestly in consequence of the financial difficulties, indeed, continuing reports of imminent O&Y bankruptcy.

6. In context of the record in these proceedings since 1985, the content and timing of the Summary Order, the continuing prejudice to FEI upon the delay in resolution of the severed claims since 1988 and the continuing prejudice imposed upon FEI in consequence of anticipated post-Summary Order proceedings now necessitated prior to any relief to FEI, e.g., **en banc** rehearing and/or other proceedings - all in context of the continuing imminence of an O&Y bankruptcy - the following relief is requested: (i) statement of the grounds and date of the recusal of Judge William H. Timbers; (ii) statement of the grounds for the nearly ten (10)-month delay in issuance of the Summary Order and the timing of issuance in context of said delay and publicly reported September 16, 1994, bankruptcy proceedings relating to O&Y; (iii) the grant of an extension of time for the service and filing of a Petition for Rehearing En Banc (a "**Petition**"), i.e., to and until October 17, 1994; (iv) the grant of permission to serve and file a Petition of no more than thirty (30) pages in length; (v) the grant of permission to serve and file as exhibits to the Petition a copy of (a) the District Court's Opinion dated September 19, 1988, (b) the District Court's Opinion dated June 2, 1989, (c) the District Court's December 23, 1992 conference dismissal directions, (d) the District Court's April 3, 1993, conference dismissal directions, and (e) a copy of the transcript of the Oral Argument herein held December 23, 1993.

Dated: New York, New York
September 21, 1994

S/

Daniel J. O'Callaghan, Esq.
Attorney for Third-Party
Defendants-Appellants
FEI LTD, JOHN J. FOGARTY
and **JEAN FOGARTY**
17 Battery Place
New York, New York 10004
(212) 222-4200

APPENDIX X - ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING MOTION RELATING TO EN BANC REHEARING *UNDATED*; DOCKETED OCTOBER 11, 1994

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

OLYMPIA & YORK	SEAL: UNITED STATES COURT
-*v*-	OF APPEALS [**MOTION**] FILED
INSURANCE CO OF NA	SEP 21 1994 GEORGE LANGE III, CLERK

93-7547

NOTICE OF MOTION ...
RELATING TO EN BANC REHEARING

MOTION BY:	OPPOSING COUNSEL:
Daniel J. O'Callaghan, Esq....	Robert B. Bernstein, Esq....

* * *

Has argument date of appeal been set: ...

Decision dated 9/15/94

* * *

Brief statement of the relief requested:

(1) An order granting additional time and pages concerning a Petition for rehearing, together with the addition of exhibits and (2) statements relating to the 9/15/94 Summary Order.

* * *

By:

S/ Daniel J. O'Callaghan 9/21/94

---------- **ORDER** ----------

IT IS HEREBY ORDERED that
the motion be and it hereby is ~~granted~~ denied

[*Undated and absent seal*] *S/ Joseph M. McLaughlin*
Circuit Judge
[Computer recorded as
docketed October 11, 1994]

APPENDIX Y - CRAIN'S NEW YORK DECEMBER 5-11, 1994, EXCERPT "O&Y PAY BATTLE SLOWS DEAL"

CRAIN'S NEW YORK BUSINESS
DECEMBER 5-11, 1994

O&Y pay battle slows deal
Execs salaries, bonuses rapped

BY PETER GRANT
CRAIN'S NEW YORK BUSINESS

Thomas P. Falus Senior VP Leasing	$900,000	$337,500
Meyer S. Frucher Executive VP/ Development	$500,000	$187,500
Joel M. Simon Chief Operating Officer	$500,000	$187,500

Just as the battle over control of Olympia & York's U.S. subsidiary moves into its final stage, a fight has erupted over compensation paid to John E. Zuccotti and other senior executives.

Also, another group of creditors is forming to challenge an alliance of Leon Black, Willliam Mack and Citibank that has been positioning itself to take over one of the city's largest office building owners....

The emergence of this group and the fight over compensation signal a crucial turning point for the U.S. subsidiary. O&Y sources predict that within 60 days, either creditors will agree on a plan for restructuring the company or will push it into bankruptcy.

Creditors and management have been working toward this point since 1992, when the parent company filed the Canadian equivalent of bankruptcy. During that time the New York-based subsidiary has spun off its most troubled properties, leaving O&Y with its eight most valuable assets: World Financial Center, 237 and 245 Park Ave., 1290 Sixth Ave., One Liberty Plaza, and buildings in Chicago, Boston and Los Angeles.

Dividing equity

Late last month, the board approved management's formula for dividing the equity in the slimmed-down company among unsecured creditors, which hold more than $750 million in debt, and the creditors of the Canadian parent. Those creditors are owed $4 billion and, in effect, control the equity of the U.S. subsidiary....

APPENDIX Z - FRCP RULE 42(b)

FRCP Rule 42(b) provides:

(b) Separate Trials. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.

APPENDIX AA - FRCP RULE 49(a)

In pertinent part, FRCP Rule 49 states:

Rule 49. Special Verdicts and Interrogatories
(a) Special Verdicts. The court may require a jury to return only a special verdict... [t]he court may submit to the jury written questions susceptible of categorical or other brief answer.... The court shall give to the jury... instruction.... If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives the right to a trial by jury of the issue so omitted unless before the jury retires the party demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

APPENDIX BB - 28 U.S.C. §46

In pertinent part, 28 U.S.C. §46 provides:

§ 46. Assignment of judges; panels; hearings; quorum

* * *

(b) In each circuit the court may authorize the hearing and determination of cases and controversies by separate panels, each consisting of three judges, at least a majority of whom shall be judges of that court, unless ....

* * *

(c) Cases and controversies shall be heard and determined by a court or panel of not more than three judges ..., unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service....

(d) A majority of the number of judges authorized to constitute a court or panel thereof, as provided in paragraph (c), shall constitute a quorum.

APPENDIX CC - FRAP EN BANC STATUTE FRAP RULE 35(b)

Rule 35. Determination of Causes by the Court in Banc

* * *

(b) Suggestion of a Party for Hearing or Rehearing in Banc. A party may suggest the appropriateness of a hearing or rehearing in banc. No response shall be filed unless the court shall so order. The clerk shall transmit any such suggestion to the members of the panel and the judges of the court who are in regular active service but a vote need not be taken to determine whether the cause shall be heard or reheard in banc unless a judge in regular active service or a judge who was a member of the panel that rendered a decision sought to be reheard requests a vote on such a suggestion made by a party.

APPENDIX DD - SECOND CIRCUIT IN BANC RULE: LOCAL RULE 35 - DETERMINATION OF MAJORITY FOR ORDERING IN BANC CONSIDERATION; COPY OF OPINIONS OR SUMMARY ORDER REQUIRED.

LOCAL RULE 35. DETERMINATION OF MAJORITY FOR ORDERING IN BANC CONSIDERATION; COPY OF OPINIONS OR SUMMARY ORDER REQUIRED

Neither vacancies nor disqualified judges shall be counted in determining the base on which "a majority of the circuit judges of the circuit who are in regular active service" shall be calculated, pursuant to 28 U.S.C. § 46(c), for purposes of ordering a hearing or rehearing in banc.

Each suggestion for rehearing in banc shall include a copy of the opinion or summary order to which the suggestion relates, unless the opinion or summary order is included in a petition for rehearing with the suggestion for rehearing in banc. [Effective May 1, 1991; amended effective July 1, 1992.]

APPENDIX EE - SECOND CIRCUIT QUORUM RULE: LOCAL RULES RELATING TO THE ORGANIZATION OF THE COURT: § 0.14 QUORUM

§ 0.14 Quorum

* * *

(b) Unless directed otherwise, a panel of the court shall consist of three judges. If a judge of a panel of the court which has heard argument or taken under submission any appeal, petition or motion shall be unable to continue with the consideration of such matter by reason of death, illness, resignation, or incapacity, or shall be relieved of such consideration at the judge's request, the two remaining judges will determine the matter if they are in agreement and neither requests the designation of a third judge....

APPENDIX FF - MURRAY CASE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Petition for Rehearing
Submitted: July 14, 1994

HWESU S. MURRAY,
Plaintiff-Appellant,

v.

NATIONAL BROADCASTING COMPANY, INC. and BRANDON TARTIKOFF,
Defendants-Appellees.

No. 1566 -- August Term 1993

Docket No. 93-9335

Decided: August 12, 1994

Before: NEWMAN, *Chief Judge*, and
LUMBARD, *Circuit Judge*.[29]

Petition for rehearing of order of summary affirmance in *Murray v. NBC*, No. 93-9335 (2d Cir. June 16, 1994). Plaintiff-appellant challenges disposition of appeal by panel of two judges where third judge recused himself immediately prior to oral argument.

Petition denied.

JON O. NEWMAN, *Chief Judge*:

Appellant's petition for rehearing raises an institutional issue of court procedure that merits a brief opinion. The issue is whether a case may be validly adjudicated by a panel of two circuit judges under circumstances where one of the three judges

---

[29]Judge Oakes, who was originally a member of the panel, recused himself prior to oral argument.

originally assigned to hear the appeal recused himself immediately before oral argument. We conclude that the two-judge panel was authorized to proceed with the determination of the appeal. We therefore deny the petition for rehearing.

The appeal was originally assigned to a panel consisting of Judge Lumbard, Judge Oakes, and the writer. When the case was called for oral argument, Judge Oakes announced that he was recusing himself and left the bench. He has not participated in the adjudication of the appeal. Argument was held before the remaining two judges of the panel. The two-judge panel affirmed by summary order, invoking Rule §0.14(b) of the Local Rules of the Second Circuit. *Murray v. NBC*, No. 93-9335 (2d Cir. June 16, 1994). Appellant's petition for rehearing includes the contention that disposition of the appeal by a two-judge panel violates both 28 U.S.C. §46(b) (1988) and Local Rule §0.14(b).

1. *The statutory claim.* 28 U.S.C. § 46(b) provides:

> In each circuit the court may authorize the hearing and determination of cases and controversies by separate panels, each consisting of three judges....

Though Congress enacted this provision to curtail the prior practice under which some circuits were routinely assigning some cases to two-judge panels, *see* S. Rep. No 97-275, 97th Cong., 2d Sess. 9, *reprinted in* 1982 U.S.C.C.A.N. 11, 19, the legislative history makes clear that the statute was not intended to preclude disposition by a panel of two judges in the event that one member of a three-judge panel to which the appeal is assigned becomes unable to participate:

> The circuit courts could continue to adopt local rules permitting the disposition of an appeal in situations in which one of the three judges dies or becomes disabled and the remaining two agree on the disposition; but, *in the first instance*, all cases would be assigned to [a] panel of at least three judges.

Id. (emphasis added). The fact that the Senate Report identifies death or disability does not preclude unavailability because of late-discovered disqualification. Moreover, the Report makes no

distinction between unavailability occurring before and after oral argument, emphasizing only that the appeal must be assigned "in the first instance" to a panel of three judges. This understanding of subsection 46(b) is explicitly borne out by subsection 46(d), which provides that "[a] majority of the number of judges authorized to constitute a court *or panel thereof*, as provided in paragraph (c) [authorizing panels of not more than three judges], shall constitute a quorum." 28 U.S.C. § 46(d) (1988) (emphasis added).

Since the pending appeal was assigned to a panel of three judges "in the first instance," one of whom thereafter recused himself, we conclude that disposition by the remaining two judges did not violate section 46(c).

2. *The local rule claim.* Appellant's contention is more plausibly supported by reliance on Local Rule § 0.14(b), which provides:

> Unless directed otherwise, a panel of the court shall consist of three judges. If a judge of a panel of the court *which has heard argument or taken under submission any appeal*, petition or motion shall be unable to continue with the consideration of such matter by reason of death, illness, resignation, or incapacity, or shall be relieved of such consideration at the judge's request, the two remaining judges will determine the matter if they are in agreement and neither requests the designation of a third judge. If they are not in agreement or either requests such a designation, the Chief Judge will designate another circuit judge to sit in place of the judge who has become unable to continue or has been relieved.

2d Cir. R. § 0.14 (b) (emphasis added). Relying on the underscored words, appellant contends that since Judge Oakes recused himself prior to oral argument, Rule § 0.14(b) does not permit disposition by a two-judge panel.

Though we acknowledge the force of the argument based on the literal wording of the local rule, we conclude, as the Supreme Court said in a somewhat similar context, that this is a situation where "any sacrifice of literalness for common sense does no violence" to the purpose of the rule. *See Textile Mills*

Securities Corp v. Commissioner of Internal Revenue, 314 U.S. 326, 334 (1941). The rule is obviously intended to permit the Court to conduct its business expeditiously despite the unanticipated unavailability of one member of a three-judge panel. The literal terms of the rule would be satisfied had Judge Oakes sat through he oral argument and recused himself immediately thereafter. It makes no sense to apply the rule so mechanically as to require a different result where recusal occurs one-half hour earlier. Indeed, a rigid application of the local rule would arguably place it in tension with the statutory authority of two judges to constitute a quorum. *See* 2 U.S.C. § 46(d); *see also* 2d Cir. R. § 0.14(a) (specifying quorum of two judges).

We recognize that in the normal course of adjudicating appeals, consideration by three judges is preferable. *See Ojeda Rios v. Wigen*, 863 F.2d 196, 199 (2d Cir. 1988) (Newman, J., chambers opinion) (noting that "on matters of substance, where recourse is had to a court of appeals, it is normally preferable, absent an emergency, to have decision rendered by more than an individual judge"); *United States v. Glover*, 731 F.2d 41, 51 (D.C. Cir. 1984) (Mikva, J., dissenting) (criticizing summary procedure permitting physical presence of only two of three judges on motions panel and expressing the view that "the more minds considering a matter, the better the ultimate resolution of the case is likely to be").

Yet, as Judge Mikva recognized in his *Glover* dissent, "as our dockets have become more full, a need for the efficient use of judicial resources has arisen, and ... this quest for efficiency on occasion must be balanced against the need for judicial pluralism." *Id.* When a judge becomes aware of a ground of disqualification just prior to oral argument, replacement of the recused judge would impair the court's efficiency and burden the parties with a return visit to the court. The argument would have to be postponed until a later date when a third judge was available and could become prepared to hear the appeal. That postponement will normally "move[] the case to a new panel, thereby wasting the time invested by the members of the original panel and burdening three additional judges with an appeal that could have been adjudicated by the original panel. " *United States v. Delia*, 925 F.2d 574, 575 (2d Cir. 1991) (Newman, J., chambers opinion).

These considerations impel us to apply Rule § 0.14(b) with

sufficient flexibility to permit disposition by two members of a three-judge panel, at least in those situations where the third judge becomes unavailable within such close proximity to the start of oral argument that replacement in time for maintaining the date of the scheduled argument is not practical. Where a replacement judge can be secured without burdening the court or the parties, it will normally be preferable to do so. Under the circumstances of this case, we conclude that the local rule does not preclude disposition of the appeal by the remaining two members of the panel.

Though not requested to do so by the appellant, we have considered whether a third judge should now be enlisted for the limited purpose of considering this petition for rehearing. The efficiency concerns that weigh against requiring a third judge to hear the appeal itself are somewhat reduced at the rehearing state, yet the need for a full panel of three judges is also somewhat reduced by virtue of the narrow focus of a rehearing petition, submitted after plenary consideration of an appeal. On such petitions, oral argument is not permitted and no response is received unless requested by the court. See Fed. R. App. P. 40 (a). On Balance, we conclude that the remaining two members of the panel, explicitly authorized to constitute a quorum eligible to act, see 28 U.S.C. § 46(d), should adjudicate the petition without a third judge.

We have considered the substantive issues presented by the petition and conclude that the petition should be denied.[30]

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[30]Because this opinion concerns, in part, an administrative matter, the opinion has been circulated to all of the active judges of this Court prior to filing. *See United States v. Burnett*, 989 F.2d 100, 102 n.1 (2d Cir. 1993).